



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

September, 1904.

LAW BOOKS

PUBLISHED BY

SWEET & MAXWELL, LIMITED,
3, CHANCERY LANE, LONDON.

ENCYCLOPÆDIA OF THE LAWS OF ENGLAND, by the most eminent legal authorities. In 13 Vols. Price £13 net in cloth, or £15 5s. net in half calf.

Full Prospectus and Names of Contributors on Application.

Admiralty.—WILLIAMS and BRUCE's Admiralty Practice. 3rd Edit. By C. F. JENNETT and G. G. PHILLIMORE. 1902. 32s.

Agency.—A Digest of the Law of Agency. By W. BOWSTEAD. 2nd Ed. 16s. 1898.

Annual Practice.—By T. SNOW, CHAS. BURNET, and F. A. STRINGER. 25s. net.

Arbitration and Award.—RUSSELL's (F.) Treatise on Power and Duty of an Arbitrator; with Forms and Statutes. 8th Edit. 30s. 1900.

Attachment.—Attachment of Debts, Receivers by way of Equitable Execution, and Charging Orders on Stock and Shares. By M. CABABÁ. 3rd Ed. 6s. 1900.

Auctions.—BATEMAN's Auctioneer's Guide, containing a Practical Treatise on the Law of Auctions; with Forms and Precedents. 7th Ed. 12s. 1894.

Bailments.—WYATT PAINE on Bailments, including Carriers, Pledges, Hire-Purchase, Liens, &c. 25s. 1901.

Bankruptcy.—WILLIAMS' Law and Practice in Bankruptcy. 8th Ed. By E. W. HANSELL. 30s. 1904.
WACE on Bankruptcy Law and Practice. 27s. 6d. net. 1904.

Bills of Costs.—JOHNSON's Bills of Costs in the High Court of Justice and Court of Appeal, in the House of Lords and Privy Council. With Fees, Orders, Rules, Decisions, &c., &c. By H. M. JOHNSON. 2nd Edit. 35s. 1901.

Bills of Exchange.—BYLES on Bills of Exchange. 16th Ed. By M. B. BYLES and W. H. B. BYLES. 25s. 1899.
—relating to Cheques. By E. R. WATSON. 1st Edit. 2s. 6d. net. 1904.

Binding Contracts.—Conditions of contract. By F. W. MACEY. 15s. net. 1902.

Building Societies.—DAVIS's (H.F.A.) Law of Building and Freehold Land Societies in England, Scotland and Ireland, &c. 4th Edit. By J. E. WALKER. 21s. 1896.

Burials.—BAKER's Law of Burials. The Law relating to Burials; with Notes, Forms, and Practical Instructions. 6th Ed. By E. EWIS THOMAS, Barrister-at-Law. 25s. 1901.

Capital and Income.—Concise Treatise on Capital and Income as between Life Tenant and Remainderman. By W. H. GOVER. 7s. 6d. 1901.

Choses in Action.—The Law relating to Choses in Action. By W. R. WARREN. 16s. 1899.

Common Law.—BROOM's Commentaries on the Common Law. 9th Edit. By W. F. A. ARCHIBALD and H. A. COLEFAX. 25s. 1896.

Companies.—LINDLEY. A Treatise on the Law and Practice of Joint-Stock and other Companies. By Lord LINDLEY. 6th Edit. By his honour Judge LINDLEY. 2 vols. 3l. 10s. 1902.

An Epitome of Company Law, for Students. By W. H. H. KELKE. 6s. 1904.

Compensation.—Code of the Law of Compensation under the Lands Clauses and other Acts affecting the Compulsory Purchase or Injurious Affecting of Land. By SYLVAIN MAYER. 38s. 1903.

Conflict of Laws.—A Digest of the Law of England with reference to the Conflict of Laws. By A. V. DICEY, Q.C., B.C.L. 80s. 1896.

Contracts.—CHITTY's (J., jun.) Treatise on the Law of Contracts. 14th Ed. By J. M. LELY. 30s. 1904.

The Specific Performance of Contracts. By W. D. RAWLINS, K.C. 5s. net. 1899.

Elements of the Law of Contract. By A. T. CARTER. 7s. 6d. 1902.

Conveyancing.—DAVIDSON's Concise Precedents in Conveyancing. 18th Ed. By M. G. DAVIDSON. 21s. 1904.
Introduction to Conveyancing. By Sir H. W. ELPHINSTONE. 5th Ed. 14s. 1900.

KEY & ELPHINSTONE's Precedents and Forms in Conveyancing. Thoroughly revised, with large additions both to the Precedents and Notes. 8th Ed. By Sir H. ELPHINSTONE. 2 vols. 3l. 10s. 1904.

Student's Precedents in. By JAMES W. CLARK, M.A. 2nd Edit. 5s. 1896.

Coroners.—JERVIS (Sir John) Practical Treatise on the Office and Duties of Coroners. With an Appendix of Forms and Precedents. 6th Edit. By RUDOLPH E. MEISHEIMER. 10s. 6d. 1898.

*1187
P. 72*

REPORTS OF

BANKRUPTCY

AND

COMPANY CASES

DECIDED IN THE

High Court of Justice, the Court of Appeal,
and the House of Lords.

EDITED BY

EDWARD MANSON,

Of the Middle Temple, Barrister-at-Law,

AND

WALTER IVIMEY COOK,

Of Lincoln's Inn, Barrister-at-Law.

VOL. XI.

COMPRISING CASES DECIDED DURING THE YEAR 1904.

TOGETHER WITH

A Complete Digest and Index.

LONDON :

EET & MAXWELL, LIMITED, 3, CHANCERY LANE,

Law Publishers.

1905.

YBA 9811 0907MAY2

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

268791

CONTENTS.

CASES REPORTED IN THIS VOLUME.

	PAGE
African Tug Co., <i>Towers v. (C.)*</i>	198
Andrews <i>v. Brown and Gregory, Limited, In re Brown and Gregory, Limited (C.)</i>	218, 402
Atkin Brothers, <i>Ex parte, In re William Watson & Co. (B.)*</i>	256
Baily <i>v. British Equitable Assurance Co. (C.)</i>	169
Barclay & Co., <i>Sheffield Corporation v. (C.)</i>	321
Beauchamp, <i>In re, Ex parte Beauchamp (B.)</i>	5
Bodega Co., Limited, <i>In re (C.)</i>	95
Bonzoline Manufacturing Co., <i>Ex parte, In re John Roberts & Co. (B.)</i>	134
Boyd, <i>British Asbestos Co. v. (C.)</i>	88
British Asbestos Co. <i>v. Boyd (C.)</i>	88
British Equitable Assurance Co., <i>Baily v. (C.)</i>	169
Broome, <i>Shepherd v. (C.)</i>	283
Brown and Gregory, Limited, <i>In re, Andrews v. Brown and Gregory, Limited (C.)</i>	218, 402
Browne, <i>In re, Ex parte Martingell (B.)</i>	148
Burnand, <i>In re, Ex parte Wilson (B.)</i>	113
Calthorpe, <i>Trechmann v. (C.)</i>	444
Canadian Produce Corporation, Finance and Issue, Limited <i>v. (C.)</i>	412
Clinton, <i>De la Cour v. (C.)</i>	444
Clough, <i>Ex parte, In re Reis (B.)</i>	229
Cornbrook Brewery Co. <i>v. Law Debenture Corporation (C.)</i>	60
Cussons, Limited, <i>In re (C.)</i>	192

* Distinguishing Bankruptcy and Company Cases.

	PAGE
David Payne & Co., <i>In re</i> , Young v. David Payne & Co. (C.) .	487
De la Cour v. Clinton (C.)	444
Derenburg & Co., <i>Ex parte</i> , <i>In re</i> Rowe (B.)	180
Devenish, Pulsford v. (C.)	398
English Electro-Metallurgical Co. v. Glasdir Copper Mines, Limited, <i>In re</i> Glasdir Copper Mines, Limited (C.) .	224
Euphrates and Tigris Steam Navigation Co., <i>In re</i> (C.) .	93
Everson, <i>In re</i> , <i>Ex parte</i> Official Receiver (B.)	339
Finance and Issue, Limited v. Canadian Produce Corpora- tion (C.)	412
Gaskell, <i>In re</i> , <i>Ex parte</i> Gaskell (B.)	125
Glasdir Copper Mines, Limited, <i>In re</i> , English Electro- Metallurgical Co. v. Glasdir Copper Mines, Limited (C.)	224
Great Fingall Consolidated, Limited, Ruben v. (C.)	353
Greaves, <i>In re</i> , <i>Ex parte</i> Official Receiver (B.)	270
Greymouth-Point Elizabeth Railway and Coal Co., <i>In re</i> , Yuill v. Greymouth-Point Elizabeth Railway and Coal Co. (C.).	85
Hancock, <i>In re</i> , <i>Ex parte</i> Hillearys (B.)	1
Hasluck v. Rose, <i>In re</i> Rose (B.)	347
Hillearys, <i>Ex parte</i> , <i>In re</i> Hancock (B.)	1
Hoare & Co. Limited, <i>In re</i> (C.)	307
Hoole v. Speak (C.)	421
Hummell v. George Routledge and Sons, Limited, <i>In re</i> George Routledge and Sons, Limited (C.)	404
Humphris, Rex v. (B.)	139
Ibo Investment Trust, Limited, <i>In re</i> (C.)	105
Jarrah Timber and Wood-Paving Corporation, Samuel v. (C.)	276
Jones's Case, <i>In re</i> Letheby and Christopher, Limited (C.) .	209
Johnson Johnson, <i>In re</i> , <i>Ex parte</i> Matthew and Wilkinson (B.)	14
Johnston Die Press Co., Limited, <i>In re</i> (C.)	378
Johnston Foreign Patents Co., Limited, <i>In re</i> (C.)	378
Johnstonia Engraving Co., Limited, <i>In re</i> (C.)	378

	PAGE
Koffyfontein Mines, Limited, <i>Moseley v. (C.)</i>	294
Lake George Mines, Limited, <i>In re (C.)</i>	214
Law Debenture Corporation, Cornbrook Brewery Co. <i>v. (C.)</i>	60
Law Guarantee and Trust Society, <i>Smith v. (C.)</i>	179
Lea <i>v. Thursby (B.)</i>	151
Letheby and Christopher, Limited, <i>In re, Jones's Case (C.)</i>	209
MacLeay, <i>Tait v. (C.)</i>	444
Macoun, <i>In re (B.)</i>	264
Manners and St. David's Gold and Copper Mines, Limited (C.)	425
Martingell, <i>Ex parte, In re Browne (B.)</i>	148
Matthew and Wilkinson, <i>Ex parte, In re Johnson Johnson (B.)</i>	14
Moseley <i>v. Koffyfontein Mines, Limited (C.)</i>	294
Natal Land and Colonization Co., Limited <i>v. Pauline Colliery and Development Syndicate, Limited (C.)</i>	29
New Balkis Eersteling, Limited <i>v. Randt Gold-Mining Co. (C.)</i>	159
O. C. S., <i>In re (B.)</i>	122
Official Receiver, <i>Ex parte, In re Everson (B.)</i>	339
_____ , <i>In re Greaves (B.)</i>	270
Parry, <i>In re, Ex parte The Trustee (B.)</i>	18
Pauline Colliery and Development Syndicate, Limited, Natal Land and Colonization Co., Limited <i>v. (C.)</i>	29
Ponsford, <i>In re, Ex parte Ponsford (B.)</i>	342
Powell, <i>In re, Powell v. Powell (B.)</i>	22
Pulsford <i>v. Devenish (C.)</i>	393
Pretoria Pietersburg Railway Co., <i>In re (C.)</i>	318
Randt Gold-Mining Co., New Balkis Eersteling, Limited <i>v. (C.)</i>	159
Reis, <i>In re, Ex parte Clough (B.)</i>	229
Rex <i>v. Humphris (B.)</i>	139
Roberts (John) & Co., <i>In re, Ex parte Bonzoline Manufacturing Co. (B.)</i>	134
Rose, <i>In re, Hasluck v. Rose (B.)</i>	347

	PAGE
Routledge (George) and Sons, Limited, <i>In re</i> , Hummell v.	
George Routledge & Sons, Limited (C.)	404
Rowe, <i>In re</i> , <i>Ex parte</i> Derenburg & Co. (B.)	180
———, <i>Ex parte</i> West Coast Gold Fields, Limited (B.).	272
Ruben v. Great Fingall Consolidated, Limited (C.)	353
Safety Explosives, Limited, <i>In re</i> (C.)	76
St. David's Gold and Copper Mines, Limited, <i>Manners v.</i> (C.)	425
Samuel v. Jarrah Timber and Wood-Paving Corporation (C.).	276
Sheffield Corporation v. Barclay & Co. (C.)	321
Shepherd v. Broome (C.)	283
Smith v. Law Guarantee and Trust Society (C.)	179
Solomons, <i>In re</i> , <i>Ex parte</i> Solomons (B.)	268, 345
Sorsbie v. Tea Corporation, <i>In re</i> Tea Corporation (C.).	34
Speak, Hoole v. (C.)	421
Strand Wood Co., <i>In re</i> (C.)	291
Sussex Brick Co., <i>In re</i> (C.)	66
Tait v. MacLeay (C.)	444
Tea Corporation, <i>In re</i> , Sorsbie v. Tea Corporation (C.) .	34
Thursby, Lea v. (B.)	151
Towers v. African Tug Co. (C.)	198
Trechmann v. Calthorpe (C.)	444
Trust (J. P.), Limited v. Johnston Foreign Patents Co., Limited	
and others (C.)	378
Trustee, The, <i>Ex parte</i> , <i>In re</i> Parry (B.)	18
Watson (William) & Co., <i>In re</i> , <i>Ex parte</i> Atkin Brothers (B.).	256
Welsbach Incandescent Gas Light Co., Limited, <i>In re</i> (C.) .	47
West Coast Gold Fields, Limited, <i>Ex parte</i> , <i>In re</i> Rowe (B.)	272
Wilson, <i>Ex parte</i> , <i>In re</i> Burnand (B.)	113
Young v. David Payne & Co., <i>In re</i> David Payne & Co. (C.) .	437
Yuill v. Greymouth-Point Elizabeth Railway and Coal Co.,	
<i>In re</i> Greymouth-Point Elizabeth Railway and Coal	
Co. (C.).	85

STANDARD LIBRARY

REPORTS OF BANKRUPTCY AND COMPANY CASES.

IN RE HANCOCK, Ex PARTE HILLEARYS.

1904, February 12. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

*Bankruptcy—Debtor's Petition—Committal Orders—Abuse of Process of Court—
Annulment of Adjudication—Bankruptcy Act, 1883, s. 8.*

Judgment creditors obtained an order against the debtor for payment of the judgment debt by monthly instalments of 4*l.*, in respect of which they also obtained committal orders. While the last committal order was in force the debtor was adjudicated bankrupt on his own petition. The debtor was personally earning about 300*l.* a year. There were no other creditors and no assets. On an application by the creditors to annul the adjudication:—

Held, that the adjudication was properly made and could not be treated as an abuse of the process of the Court, since by reason of the adjudication the bankrupt's future earnings would under section 44 of the Bankruptcy Act, 1883, be available for payment of the creditors' debt, except to the extent necessary for the support of the bankrupt and his family, according to the rule stated in *In re Roberts, Ex parte Roberts* (1).

THIS was an appeal by Messrs. Hillearys against an order of Mr. Registrar Hope.

On 18 April, 1889, Messrs. Hillearys obtained judgment against Hancock for 209*l.* 7*s.* 8*d.* and 4*l.* 14*s.* costs.

On 1 May, 1902, the creditors issued a judgment summons in

(1) 7 Manson, 5; [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 81 L. T. 467; 48 W. R. 132.

the High Court, on which on 21 June, 1902, PHILLIMORE, J., made an order against the debtor for payment by monthly instalments of 4l.

On 1 November, 1903, PHILLIMORE, J., made a committal order under the Debtors Act, 1869, s. 5, on a second judgment summons in respect of certain instalments, which were ultimately paid; and on 31 January, 1903, WRIGHT, J., made a similar order on a third judgment summons in respect of certain other instalments. These were also ultimately paid.

On 20 July, 1903, the creditors issued a fourth judgment summons, on which (after some negotiations had passed) on 8 August, 1903, WRIGHT, J., made a committal order for 15l., to be suspended for a week.

On 14 August, 1903, the debtor, under the Bankruptcy Act, 1883, s. 8 (2), presented his own petition in the usual form, alleging that he was unable to pay his debts, on which a receiving order and adjudication in bankruptcy were made the same day.

The creditor then applied to the Registrar for an order to annul the adjudication and rescind the receiving order. The Registrar refused the application, and the creditors appealed.

It appeared that the debtor held a position as salesman in the City at a salary of 5l. a week, which was increased by commission on sales to about 300l. a year. He lived apart from his wife (who had a separate maintenance) in a house at Brentwood, the rental of which was some 60l. a year, and maintained his two children, who lived with him. Since 21 June, 1902, he had paid in all 41l. 19s. 6d. in respect of the judgment debt. The Official Receiver reported that there were no other debts and no assets.

H. Reed, K.C., and S. Lynch, for the appellants:

The presentation of his own petition by the debtor under the circumstances, and the receiving order and adjudication thereon,

(2) Bankruptcy Act, 1883, s. 8, sub-s. (1): "A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall

thereupon make a receiving order."

Bankruptcy Rules, 1886, r. 190: "At the time of making a receiving order or at any time thereafter, the Court may, on the application of the debtor himself, adjudge him a bankrupt. Such application may be made orally and without notice."

amount to an abuse of the process of the Court, the sole object being to escape from the consequences of the orders made under the judgment summonses. The Judges in making those orders were satisfied of the debtor's ability to pay. The case of *In re Painter, Ex parte Painter* [1894] (3), which will be cited against us, is distinguishable, as in that case there were other debts and some small assets, and no committal order had been made. *In re Betts, Ex parte Official Receiver* [1901] (4), is in our favour. It was conceded in *In re Painter, Ex parte Painter* (3), that, notwithstanding the word "shall" in section 8, sub-section 1, the Court had a discretionary power.

[VAUGHAN WILLIAMS, L.J.: In the case of a creditor's petition, section 7, sub-section 3, of the Bankruptcy Act, 1883, gives the Court an express power to dismiss the petition. There is no similar express power in the case of the debtor's own petition, because it is really an *ex parte* proceeding and subject to be set aside like any other *ex parte* proceeding if sufficient grounds are shown. The same considerations may explain the distinction between "may make a receiving order" in section 6, sub-section 2, in the case of a creditor's petition and "shall thereupon make a receiving order" in section 7, sub-section 1.]

The adjudication here should be set aside, because it ought never to have been made. It is doubtful whether the debtor's salary could be reached under section 53 of the Bankruptcy Act, 1883: *In re Shine* [1892] (5).

Muir Mackenzie, for the respondent:

The present case is completely covered by *In re Painter, Ex parte Painter* (3), which was a very strong case, as there the weekly pension was inalienable. *In re Betts, Ex parte Official Receiver* (4), is distinguishable. In the present case the salary may be available

(3) 1 Manson, 499; [1895] 1 Q. B. 85; 64 L. J. Q. B. 22; 71 L. T. 581; 43 W. R. 144.

(4) 8 Manson, 227; [1901] 2 K. B. 39; 70 L. J. K. B. 511; 84 L. T. 427; 49 W. R. 447.

(5) 9 Morr. 40; [1892] 1 Q. B. 522; 61 L. J. Q. B. 253; 66 L. T. 146; 40 W. R. 386.

under the adjudication as after-acquired property under the Bankruptcy Act, 1883, s. 44, sub-s. 2 (ii.): *In re Roberts, Ex parte Roberts* [1899] (1). The Bankruptcy Act, 1890, s. 8, sub-s. 2, enables the Court to impose conditions on the bankrupt's discharge, and so prevent any injustice being done.

VAUGHAN WILLIAMS, L.J.: In my opinion the order of the Registrar was perfectly right, and there is no ground for saying that the making of the receiving order or the adjudication on the debtor's own petition was an abuse of the process of the Court. It was decided in *In re Roberts, Ex parte Roberts* (1), that under section 44, sub-section 2 (ii.), of the Bankruptcy Act, 1883, which vests in the trustee all the property belonging to the bankrupt at the commencement of the bankruptcy or acquired by him before his discharge, all personal earnings of the bankrupt between the commencement of his bankruptcy and his discharge belong to his trustee, save only what is necessary for the support of the bankrupt and his family. Having regard to that decision—which was by no means the first decision to that effect—it is quite plain that, so far as concerns the payment of the creditors' debt out of assets arising from the personal earnings of the bankrupt, there will be nothing in this adjudication which ought to prejudice these creditors in any degree. The very money which they seek to get at by from time to time obtaining a committal order will come to them by reason of this adjudication. Under these circumstances, it seems to me impossible to say that the presentation of this petition was an abuse of the process of the Court. It is quite true that the result of the receiving order will be that the debtor will not be liable to pressure from time to time arising from the creditors obtaining a committal order against him. I am not prepared to say that the Legislature did not intend that a debtor who was being subjected to such pressure might relieve himself by obtaining an adjudication in bankruptcy against himself; but this is not a case, as I have already pointed out, in which the debtor could thereby achieve the result of relieving himself from payment of the debt due to his only creditors. On the contrary, that debt will or may be paid to these creditors by the statutory means which the Legislature intended to apply in a

case such as this. I think, therefore, that it is impossible in the present case to say that the presentation of this petition was an abuse of the process of the Court.

STIRLING, L.J.: I agree.

COZENS-HARDY, L.J.: I also agree.

Appeal dismissed.

Solicitors: *R. J. Gooch*, for the Appellants.

Thomas Charles, for the Respondent.

IN RE BEAUCHAMP, EX PARTE BEAUCHAMP.

1903, November 20, 21, 23, 24; 1904, February 22. C. A.

VAUGHAN WILLIAMS, ROMER, AND STIRLING, L.JJ.

Bankruptcy—Judgment—Power of Court to go Behind—Bankruptcy Notice—Address of Creditor—Bankruptcy Act, 1883, s. 4, sub-s. (1) (g)—Bankruptcy Rules, 1886, r. 136, form 6.

The power of the Court in bankruptcy to go behind a judgment is a power to inquire into the consideration and not into the form of the judgment, and the judgment is conclusive unless the consideration can be questioned.

The address of the creditor in a bankruptcy notice should be of a place where he is to be found during the seven days within which the judgment debt is to be paid or secured, and this is so whether that address is of his residence or place of business. Occasional absence from such place, even for a whole day, will not render the bankruptcy notice inefficient unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing the debt. It matters not that the address is the temporary home of the creditor, who happens to have no permanent home, or that his occasional absence occurs on the last of the seven days. On the other hand, if the creditor, after service of the notice, abandons his place of address, so that it ceases to be such a place as above described, the bankruptcy notice will cease to be efficient.

In re Stogdon, Ex parte Leigh (1), considered.

THIS was an appeal by the debtor from a receiving order in bankruptcy which was made against her by Mr. Registrar Giffard on 31 October, 1903, upon the petition of Mrs. Watt, the alleged act of bankruptcy being non-compliance with a bankruptcy notice. On 25 July, 1901, Mrs. Watt commenced an action for libel against

(1) 2 Manson, 382; [1895] 2 Q. B. 534; 65 L. J. Q. B. 47; 73 L. T. 279; 14 R. 657.

the debtor, who was described in the writ as "a married woman." At this time a decree *nisi* for the dissolution of the debtor's marriage had been made at the instance of her husband. The decree was made absolute on 25 November, 1901. At the trial of the action, which came on in 1902, the jury found a verdict for the plaintiff with 5,000*l.* damages, and judgment was given accordingly on 30 October, 1902. An application for a new trial was made to the Court of Appeal, and that Court on 17 June, 1903, ordered a new trial, unless the plaintiff would consent to reduce the damages to 1,500*l.* The plaintiff afterwards consented to this, and the judgment was amended accordingly on 15 July, 1903, but the original date of 30 October, 1902, was retained. The judgment as drawn up was in the ordinary form of judgment against an unmarried woman, and not in the form of a judgment against a married woman in respect of her separate estate, as settled by the Court of Appeal in *Scott v. Morley* [1887] (2).

An appeal by the debtor to the House of Lords against this judgment was pending.

On 25 July, 1903, Mrs. Watt issued a bankruptcy notice in form No. 6 of the Appendix to the Bankruptcy Rules, 1886: "Julia Watt (a married woman) to the Honourable Violet Julia Charlotte Maria Beauchamp (unmarried), take notice that within seven days after service of this notice on you, excluding the day of such service, you must pay to Julia Watt, of "Hans Crescent Hotel," Hans Crescent, in the county of London, the sum of 1,969*l.* 10*s.* 9*d.* claimed by her as the amount due for principal, interest and costs, on a final judgment obtained by her against you in the King's Bench Division of the High Court of Justice, dated 30 October, 1902, amended by order of the Court of Appeal, dated 17 June, 1903, and order of Master Archibald, dated 15 July, 1903, whereon execution has not been stayed, or you must secure or compound for the said sum to her satisfaction or the satisfaction of the Court, or you must satisfy the Court that you have a counterclaim, set-off, or cross demand against Julia Watt which equals or exceeds the sum claimed by her and which you could not set up in the action in which the judgment was obtained."

(2) 4 Morr. 286; 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919; 36 W. R. 67; 52 J. P. 230.

The amount of interest claimed in the bankruptcy notice was calculated from 30 October, 1902, the date of the original judgment.

As regards Mrs. Watt's address in the bankruptcy notice, it appeared that she was in the habit of staying at the "Hans Crescent Hotel" when in London, though she did not permanently retain a room there. The bankruptcy notice was served on 28 July, and Mrs. Watt was at the "Hans Crescent Hotel" on that day, and remained there until the morning of 4 August (the seventh day from the date of the service of the notice), on the morning of which she left the hotel on a motor-car and went to Newhaven, and thence to Dieppe. She left no address. She returned to England at the end of September and went to the "Hans Crescent Hotel" on 30 September.

Under these circumstances it was contended on behalf of the debtor that the bankruptcy notice was bad—first, because the Court in bankruptcy had power to go behind a judgment, and if it did so would find that the judgment ought to have been given in the *Scott v. Morley* (2) form, on which no bankruptcy notice could be founded; and secondly, because the address of the creditor was not an effective address such as is contemplated by the Bankruptcy Act. A further point was taken that interest ought not to have been calculated from the date of the original judgment.

H. Reed, K.C., and F. Mellor, for the appellant:

There is no effectual judgment debt in the present case. A married woman may be sued for a wrongful act either alone under sub-section 2 of section 1 of the Married Women's Property Act, 1882, or she may be sued jointly with her husband: *Seroka v. Kattenburg* [1886] (3) and *Earle v. Kingscote* [1900] (4); but if she is sued alone, execution can only be had against her separate estate, though there may be a doubt whether her separate estate is liable for a tort committed by her not in respect of the separate estate: *Wainford v. Heyl* [1875] (5). At any rate, there can only be one form of order in such an action, and she cannot be made bankrupt under a judgment in that form, whether the action is in

(3) 17 Q. B. D. 177; 55 L. J. Q. B. 375; 54 L. T. 649; 34 W. R. 543.

(4) [1900] 2 Ch. 585; 69 L. J. Ch. 725.

(5) L. R. 20 Eq. 321, 324; 44 L. J. Ch. 567; 33 L. T. 155; 23 W. R. 848.

respect of a tort or a contract: *Scott v. Morley* (2), *In re Handford & Co.* [1899] (6), and *Softlaw v. Welch* [1899] (7).

[VAUGHAN WILLIAMS, L.J., referred to *Liverpool Adelphi Loan Association v. Fairhurst* [1854] (8).]

If the woman becomes a *feme sole* while the action is pending, the plaintiff ought to start a fresh action against her. It is not right simply to have the order drawn up as if she were a *feme sole*. The rights of the parties cannot be altered by the order being wrongly drawn up.

[They referred to *Salomon v. Salomon & Co.* [1896] (9).]

[VAUGHAN WILLIAMS, L.J.: Will the receiving order interfere with the appeal to the House of Lords?]

Muir Mackenzie, for the respondent:

No. The Registrar has in his discretion refused to stay proceedings pending that appeal, and this Court will not interfere unless it is clear that the Registrar has used his discretion wrongly: *In re Flatau, Ex parte Official Receiver* [1893] (10). There is no ground for saying that here.

H. Reed, K.C.:

The Court of Bankruptcy can go behind a judgment and inquire what is the real liability. There is a further objection that the bankruptcy notice asks for 1,500*l.* and interest from 30 October, 1902, as if the original judgment had been for that amount; but that order was, in effect, set aside, and there was no judgment for 1,500*l.* until the order of the Court of Appeal had been made.

(6) 6 Manson, 131; [1899] 1 Q. B. 566; 68 L. J. Q. B. 386; 80 L. T. 125; 47 W. R. 391.

(7) [1899] 2 Q. B. 419; 68 L. J. Q. B. 940; 81 L. T. 64; 47 W. R. 626.

(8) 9 Ex. 422, 429; 23 L. J. Ex. 163, 165; 2 C. L. R. 512; 2 W. R. 233; 18 Jur. 191.

(9) 4 Manson, 89; [1897] A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193.

(10) 10 Morr. 151; [1893] 2 Q. B. 219; 62 L. J. Q. B. 569; 68 L. T. 740; 41 W. R. 529; 4 R. 414.

There can be no interest on the 1,500*l.* until then. *Fisher v. Dudding*[1841](11) is distinguishable.

Another ground of appeal is based on the insufficiency of the address of the judgment creditor in the bankruptcy notice.

The address of Mrs. Watt is not properly stated as required by Rule 136 of the Bankruptcy Rules, 1886, and Form 6 in Part I. of the Appendix. An address must be given where the creditor can be found in case the debtor should wish to pay or compound for the debt. Mrs. Watt's address was given at an hotel. She left the hotel at 10.15 on the morning of the seventh day after service of the notice, and left no address. She kept no room there, and letters coming there for her were kept there and not sent to her solicitor. Under those circumstances the non-payment of the debt within the seven days did not constitute an act of bankruptcy: *In re Stogdon, Ex parte Leigh*[1895](1).

Muir Mackenzie and *T. Mathew*, for the respondent, were called on to argue as to the sufficiency of the address of the judgment creditor in the bankruptcy notice:

It must be shown that the debtor has been in some way prejudiced by the alleged defect in the notice. *In re Stogdon, Ex parte Leigh*(1), did not lay down any principle which governs this case. The address there was not really an address at all, and that decision cannot prevent the Court from holding here that an act of bankruptcy has been committed. The defect in the notice must be material to affect its validity: *In re Low, Ex parte Gibson*[1895](12).

The rules and forms must be followed strictly, but not slavishly: *In re Murrietta, Ex parte South American and Mexican Co.*[1896](13). The debtor has not shown any effort to pay or compound.

H. Reed, K.C., in reply:

The practice in these matters is of great importance. It is important that all the forms should be strictly followed, as bankruptcy law is of a personal character: per *BOWEN, L.J.*, in *In re*

(11) 3 *Man. & G.* 238; 3 *Scott (N.R.)* 516; 9 *D. P. C.* 872; 10 *L. J. C. P.* 323.

(12) 2 *Manson*, 169; [1895] 1 *Q. B.* 734; 64 *L. J. Q. B.* 362; 72 *L. T.* 450; 43 *W. R.* 405; 57 *J. P.* 292; 14 *R.* 371.

(13) 3 *Manson*, 35.

Howes, Ex parte Hughes [1892] (14). The address of the judgment creditor must be an effective address at the date of the issue and service of the notice, and must continue to be so during the entire seven days. Those conditions were not satisfied in the present case, and the decision of the Registrar was wrong.

Cur. adv. vult.

1904, February 22.

VAUGHAN WILLIAMS, L.J., read the judgment of the Court as follows: This is an appeal from a receiving order made against a divorced wife, who at the time of the making of the order was a single woman. The objections raised are three: First, that there is no judgment debt effectual as against the Court of Bankruptcy, which does not regard estoppel binding the debtor, but has a right to inquire into the real debt. Secondly, it is objected that there is no act of bankruptcy, because the act of bankruptcy relied on, which is failure to comply with a bankruptcy notice, is invalidated by the facts, as alleged, that the notice contained no such address of the judgment creditor as was intended by the Act should be given. Thirdly, it was objected that the bankruptcy notice was bad, because the amount of the judgment as therein stated was wrong by reason of including interest prior to the date when the Court of Appeal amended the judgment by reducing the damages from 5,000*l.* to 1,500*l.*

As to the first point, undoubtedly the Court of Bankruptcy has the power on the hearing of a bankruptcy petition to go behind the judgment and to inquire into the consideration for the judgment debt, not only at the instance of the trustees, but also at the instance of the judgment debtor himself. This power is founded on section 7, sub-section 3, of the Bankruptcy Act, 1883, which gives the Court of Bankruptcy, on the hearing of a bankruptcy petition, a discretion for "any sufficient cause" to dismiss the petition. But, in my judgment, the fact that the judgment may be irregular or wrong in form is no sufficient reason for going behind the judgment and dismissing the petition. The action in the present case is an action for a tort committed by a woman

(14) [1892] 2 Q. B. 628, 632; 62 L. J. Q. B. 88, 90; 67 L. T. 213; 40 W. R. 647.

during coverture ; it is for a libel published by her while she was a married woman. Now, by the common law, independently of the Married Women's Property Act, 1882, a married woman was liable to be sued for a wrong committed by her, and the husband, strictly speaking, was not liable to be sued at all for such tort. His only liability was to be sued jointly with her, because of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant ; and it was decided in *Capel v. Powell* [1864] (15) that a husband who has obtained a divorce is not liable to be joined in an action of tort for a tort committed by his wife during coverture. It is manifest, therefore, that in the present case, in which the defendant at the date of the trial and judgment had been divorced, she alone remained liable for the tort, and the amendments, if any, which were required in the writ or pleadings went merely to the form and not to the substance of the cause of action. The case is very different from the case of a breach of a contract entered into by a wife during coverture. In such a case coverture is a plea in bar and not in abatement, and the cause of action given by the Married Women's Property Act, 1882, and the remedy thereon are new, being created by Act of Parliament ; whence it follows that, if the husband dies or obtains a divorce, this will not affect the statutory cause of action or the remedy thereof, but the remedy will remain a remedy against the wife's separate property, and the judgment in such an action will not create a personal debt from her, and therefore will not support a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. (1) (g). It is true that in the present case we have not to deal with the setting aside of a bankruptcy notice, because the judgment in form creates a personal debt ; but if in substance the action had been one in which no judgment could have been obtained creating a personal debt by the wife, I am disposed to think there would have been sufficient cause to dismiss the petition. But in the present case no such question arises. It is plain that the objection to the judgment, if any, is one of form only, and that the power of the Court of Bankruptcy to go behind a judgment is a power to inquire into the consideration, and not into the form of

(15) 17 C. B. (N.S.) 743 ; 34 L. J. C. P. 168 ; 11 L. T. 421 ; 13 W. R. 159 ; 10 Jur. (N.S.) 1255.

the judgment. The judgment, to my mind, is conclusive, unless the consideration can be questioned. The first objection therefore fails.

The third objection—that is to say, the “interest” objection—is also concluded by the judgment. The Court of Bankruptcy cannot, I think, question the discretion of the Court in such a matter.

The only remaining objection is the objection founded on the insufficiency of the address given by the judgment creditor in the bankruptcy notice. The objection is based upon the judgments of the Court of Appeal in *In re Stogdon, Ex parte Leigh* (1). Now in that case the judgment creditor, who was out of England at the time the notice was served, and so continued during the seven days that it was running, inserted in the bankruptcy notice as his address, “White’s Club, St. James’s, S.W.”; and the Court of Appeal decided that the bankruptcy notice was bad, holding that the notice must describe the creditor as of an address where the sum claimed can be paid to him or secured or compounded for, not merely where he could be heard of, and that the address of “White’s Club” was not under the circumstances such an address; and the question which we have now to decide is whether the address given by Mrs. Watt is such an address as is required by the Act, having regard to the decision in *In re Stogdon, Ex parte Leigh* (1). Now what are the facts? Mrs. Watt appears to have been in the habit for some time of staying at the “Hans Crescent Hotel” whenever she came to London, but she did not continuously keep a room there. Sometimes she left an address to which her letters could be sent, sometimes she did not. At the date of the issue of the bankruptcy notice she was not in fact at the “Hans Crescent Hotel”; she seems to have come there on the evening of 28 July, so that the seven days mentioned in the notice would not run out till the end of 4 August. She left the hotel on the morning of 4 August in a motor-car, and went to Newhaven and thence to Dieppe. She did not return to England till the end of September, and she went on 30 September to the “Hans Crescent Hotel.” She left on 4 August no address to which her letters could be sent, and in fact they were not sent after her. In order to see whether this address fulfils the conditions laid down in *In re Stogdon, Ex parte*

Leigh (1), one must ascertain what is the principle of that decision ; and it is the more necessary to do so because it will govern the practice of the Bankruptcy Court hereafter. It is plain that it is not sufficient for the creditor merely to give an address where he can be heard of, but it must be an address where he can be paid, or where by agreement the debt can be secured or compounded. Now what does this mean ? Suppose a creditor gives as his address his home where he permanently lives. Is he bound to remain at home all day, or never to go out without leaving word where he proposes to go, but, for the matter of that, might not succeed in going ? This is impossible. What, then, are the necessary conditions of the address ? I think that the address must be of a place where the creditor is to be found during the seven days, and this is so whether that address is of the residence or of the place of business of the creditor ; and I think that, if the address given in the bankruptcy notice is such an address at the date of the service of the notice, occasional absence of the creditor from such place, even for a whole day, will not render the bankruptcy notice inefficient, unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing according to the terms of the notice. And I do not think that it would make any difference that the address was the temporary home of the creditor who happened to have no permanent home, or that the absence relied on as depriving the bankruptcy notice of its efficiency happened to occur on the last day of the seven. On the other hand, I think that, if the creditor, after the service of the notice, abandoned his place of address, so that it ceased to be a place where at reasonable times the creditor could be found (or some authorised agent on his behalf) to receive payment of the judgment debt, or to deal with the question of security, the bankruptcy notice would cease to be efficient. It was urged in the present case that when Mrs. Watt started on her journey to the Continent she abandoned her temporary address, and ceased to have any address where she, or any agent authorised to act on her behalf in the matter, could be found. My brethren think that, having regard to her practice of residing at the "Hans Crescent Hotel," and to the fact that her letters would be likely to be delivered there after her departure, this contention on behalf of the debtor fails in fact ; and I do not think I ought

to differ from them on a question of fact, so this appeal will be dismissed with costs.

I wish to add that the decision of the Court of Appeal in *In re Stogdon, Ex parte Leigh* (1), seems to me, so far as the observations contained in the judgments are concerned, to be difficult of practical application. Perhaps it might be considered whether the rules and forms might not be somewhat altered.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Michael Abrahams, Sons & Co.*, for the Appellant.
Charles Russell & Co., for the Respondent.

IN RE JOHNSON JOHNSON, EX PARTE MATTHEW
AND WILKINSON.

1908, December 7, 12. PHILLIMORE AND WRIGHT, JJ.

Bankruptcy—Settlement of Settlor's own Property—Life Estate Determinable on Bankruptcy—Forfeiture—Payment of Debts—Second Bankruptcy.

An unmarried man settled his own property on himself for life, determinable on bankruptcy, with certain limitations over. He subsequently became bankrupt, and his trustee in bankruptcy obtained an order setting aside the settlement so far as was necessary to pay the bankrupt's debts. The debts were accordingly paid, but the bankruptcy was not annulled. The settlor then became bankrupt a second time, and the trustee in that bankruptcy applied for a declaration that the bankrupt's life estate had vested in him, the trustee:—

Held, that the first bankruptcy operated as a forfeiture of the settlor's life estate, and that it did not therefore vest in the trustee in the second bankruptcy.

THIS was an appeal from a decision of the Judge of the Manchester County Court.

The bankrupt Johnson, being then and now an unmarried man, and having then only just come of age, made on 1 September, 1893, a settlement of certain property, of which settlement the appellants are the present trustees.

The property settled was a share of residue passing under his grandfather's will; and the grandfather, when bequeathing legacies to his sons for their lives, had made such legacies determinable

on bankruptcy or upon the assignment or charge of the annual income.

The settlement made by the bankrupt Johnson, instead of expressing the trusts and limitations explicitly, stated them by way of reference to the grandfather's will. There was, however, no dispute as to what the trusts were. The settlor assigned property to the trustees on trust to pay him the annual income until he was declared bankrupt or should assign or charge the annual income. Thereafter his rights were to cease, and the trustees were to have power to apply or not, as they thought fit, the income or any part for his personal maintenance and support, and were to apply the residue, if any, for the benefit of his children, if any, or to accumulate it and add it to the *corpus*, which *corpus* was ultimately to go to certain relations.

In 1900 there was a first adjudication of bankruptcy. The trustee in that bankruptcy moved under section 47 of the Bankruptcy Act, 1883, to set aside the settlement, and it was set aside so far as was necessary to pay the bankrupt's debts provable in that bankruptcy. Thereupon under an order made by consent, the trustees of the settlement raised a sufficient sum to pay the debts in full, and costs. The bankruptcy was not, however, formally annulled.

In 1902 there was a second bankruptcy. The trustee in that bankruptcy also applied to set aside the settlement; but he failed to do so, the County Court Judge finding, as a fact, that at the time of making the settlement the bankrupt was able to pay all his debts without the aid of the property comprised in it.

The trustee in bankruptcy then applied to have it adjudged and declared that the life estate of the bankrupt under the settlement vested in him, the trustee, and that he was entitled to the income thereof, with arrears. He obtained an order in those terms, which is the order now appealed from.

Leigh Clare, for the appellant :

The effect of the first bankruptcy was to determine the life interest of the bankrupt and to vest the settled property in the trustees of the settlement for the benefit of the persons entitled in remainder.

A. H. Carrington, for the respondent :

The first bankruptcy did not avoid the settlement. The trustees of the settlement consented to clear off the debts of the bankrupt out of the settled fund, and therefore the bankruptcy must be treated as if it had been annulled : *Metcalfe v. Metcalfe* [1889] (1).

Leigh Clare replied.

1903, December 12.

The judgment of the COURT was read by

PHILLIMORE, J., who, after stating the facts as above set out, continued : An owner of property cannot by way of settlement or contract qualify his own interest in property by a condition determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors. This was decided in *Wilson v. Greenwood* [1818] (2), and the decision has been followed in a number of cases, many of which will be found cited in *Mackintosh v. Pogose* [1895] (3).

But this rule applies only to a limitation on bankruptcy and to cases where, but for this limitation, the property or income would have come to the assignee or trustee in bankruptcy ; and then only so far as it would have thus come. Thus in *In re Detmold*, *Detmold v. Detmold* [1889] (4), the husband settlor with a similar clause suffered an incumbrance of his income by the appointment of a receiver at the suit of a judgment creditor on 19 July, 1888. In or about September of the same year he was adjudicated bankrupt upon an act of bankruptcy committed on 29 July. It was held that before the act of bankruptcy there had been a forfeiture by the husband owing to the appointment of a receiver ; that the limitation over to the wife upon such forfeiture was good inasmuch as it defeated a particular alienee, and was not a fraud on the bankrupt laws ; that therefore the gift over had taken effect before the bankruptcy, the income had become vested in the wife,

(1) 43 Ch. D. 633 ; 59 L. J. Ch. 159 ; 61 L. T. 767 ; 38 W. R. 397.

(2) 1 Swanst. 471, 481.

(3) 2 Manson, 27 ; [1895] 1 Ch. 505 ; 64 L. J. Ch. 275 ; 72 L. T. 251 ; 43 W. R. 247.

(4) 40 Ch. D. 585 ; 58 L. J. Ch. 495 ; 61 L. T. 21 ; 37 W. R. 442.

and there was nothing for the trustee in bankruptcy to take. Following this authority, the Judge in *In re Brewer's Settlement, Morton v. Blackmore* [1896] (5), stated as follows: "The question is whether the life interest had determined previously to the bankruptcy. In that case it was held that what had been done previously to the bankruptcy did not amount to forfeiture or determination of the life interest, and therefore the trustee in bankruptcy took the life interest.

In the case before us the trustee in the first bankruptcy, if he had failed in setting aside the settlement, would have succeeded in getting the bankrupt's life interest under it, because to allow the limitation over to take effect would have been, in the language of the cases, a "fraud upon the bankrupt laws," or a disposition of property forbidden by law. But though the alienation could not take effect so as to disappoint and delay the creditors in the first bankruptcy, it operated as against the settlor as a forfeiture. He lost all his rights to the residue left after paying those creditors. The income came under the control and discretion of the trustees. If the limitation over had been to a determined person, as to the wife in the case of *In re Detmold* (4), she would have claimed a vested interest, which could only have been divested by impeaching the settlement—an impeachment which in this case has failed.

The case looks different because the trustees of the settlement have a discretionary power, but the law to be applied is the same.

The appeal must be allowed.

Appeal allowed.

Solicitors: *W. E. Dowson*, for the Appellant.

W. B. Glasier, for the Respondent.

(5) [1896] 2 Ch. 503; 65 L. J. Ch. 821; 75 L. T. 177; 45 W. R. 8.

IN RE PARRY, EX PARTE THE TRUSTEE.

1908, November 80. WRIGHT, J.

Bankruptcy—Revocable Settlement—Consent of Trustees—Substituted Settlement—Consideration—"Purchaser"—Avoidance—Bankruptcy Act, 1883, s. 47.

A., who was then solvent, executed a voluntary settlement revocable with the consent of the trustees. Subsequently, more than three years later, he partially revoked this settlement with the necessary consent. This consent was given on condition that A. should settle certain further property for the benefit (*inter alia*) of the beneficiaries under the former settlement. Within three years of executing this second settlement A. became bankrupt:

Held, that the second settlement was not a transaction of purchase for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and was void accordingly as against the trustee in bankruptcy.

In re Pumfrey, Ex parte Hillman (1), as explained in *Hance v. Harding* (2), followed.

On 4 October, 1899, Charles Parry made a voluntary settlement (hereinafter called the first settlement) of certain property, on trust that he should receive the income for his life, with remainder to his children, and, in default of issue, in ultimate remainder for certain other persons.

This settlement contained a power of revocation with the consent in writing of the trustees.

On and prior to 29 December, 1902, Parry was in pressing monetary difficulties, and was anxious to raise a sum of 1,600*l.* for the payment of his creditors. He accordingly approached the trustees of the first settlement, and asked them to give their consent in writing to the revocation of this settlement so far as should be necessary to raise out of the property subject to it the required sum of 1,600*l.* The trustees agreed to give Parry the necessary consent, on the condition that he should bring into a second settlement containing certain stipulated trusts, his life interest in the property that would still remain subject to the trusts of the first settlement, and on the further condition that he would also bring into this second settlement a certain contingent interest belonging to him in a sum of about 8,000*l.* Parry, accordingly, on 29 December, 1902, executed a second deed of settlement (hereinafter called the second settlement) by which

(1) 10 Ch. D. 622; 48 L. J. Bk. 77; 40 L. T. 178; 27 W. R. 567.

(2) 20 Q. B. D. 732; 57 L. J. Q. B. 403; 59 L. T. 659; 36 W. R. 629.

it was agreed that his life income under the first settlement (less the income of 1,600*l.*), and the income of the said contingent sum of about 3,000*l.* (if and when received) should be paid during his life, at the absolute discretion of his trustees, to the said Charles Parry, or to his wife or children or remoter issue, in such proportions as the trustees should think fit. And it was thereby further agreed that, subject to this discretionary trust, the property then newly brought into settlement should be held by the trustees upon trusts similar to those already declared by the first settlement.

On the same day the trusts of the first settlement were revoked, so far as they related to the sum of 1,600*l.*, with the consent in writing of the trustees.

A receiving order was made against Parry on 2 September, 1903.

The trustee in bankruptcy now moved that the second settlement might be set aside as a voluntary settlement, so far as might be necessary to satisfy the claims of creditors under the provisions of section 47 of the Bankruptcy Act, 1883 (3).

H. Reed, K.C., and *Mellor*, for the trustee in bankruptcy :

The second settlement is void, as against the trustee, under section 47. There was no valuable consideration, for the consent of the trustees to the partial revocation of the first settlement could not constitute a consideration, and the sum of 1,600*l.* obtained by the bankrupt was really obtained from himself. "Purchaser," in section 47, means a purchaser in the ordinary, commercial sense of the term, not a purchaser in the technical, legal sense: *In re Pumfrey, Ex parte Hillman* [1879] (1); and in this ordinary, commercial sense of the term there is clearly no purchaser here. This argument is enforced by the decision in *Hance v. Harding* [1888] (2), in which the case first cited was discussed and explained.

(3) Bankruptcy Act, 1883, s. 47, sub-s. 1: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on

or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy. . . ."

Buckmaster, K.C., and *Hansell*, for the trustees of the settlement :

At the time of the second settlement there was then in existence a first settlement, indefeasible except with the consent of the trustees, under which a number of people were interested. The trustees of this first settlement, as representing these people, surrendered the interest of these people, so far as concerned the sum of 1,600*l.*, on the express condition that something should be given them in return—that is, the execution of the second settlement. This surrender was a real consideration for the execution of the second settlement, which is not, accordingly, within the mischief of section 47 : *Ex parte Berry* [1812] (4).

H. Reed, K.C., replied.

WRIGHT, J. : The view that I take of this case depends entirely upon the fact that the trusts of the first settlement were revocable at the request of the settlor with the consent of the trustees at their discretion ; and, having regard to that fact, it seems to me that I ought not to hold that the second settlement was a transaction of purchase for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1888, as construed in *In re Pumfrey, Ex parte Hillman* (1), having reference to the explanation of that case in *Hance v. Harding* (2).

What really took place is this : The settlor, being anxious to obtain a present use of portions of the settled assets which were capable of immediate realisation, was willing to bring into settlement other assets which probably were not capable of immediate realisation, on the terms that the trustees, who had a discretionary power of consenting to the revocation of the trusts, should exercise their discretion so far as to consent to his taking out of settlement that portion of the old assets that he required.

Now, the only question is whether this consent which the trustees gave was a consent given by them as purchasers for valuable consideration within the meaning of section 47. I do not think it was, in reality, a transaction of purchase at all, in the sense in which the word “ purchaser ” is construed in the cases to

which I have referred. The trustees did not, as it seems to me, purchase for any price whatever. The proper description of what they did is this—that they only exercised a fiduciary power to consent to terms which satisfied them that the trusts would not suffer. In one sense it may be said that the consideration which was given for a sale of assets to the amount of 1,600*l.* really came from the debtor himself; but the ground for the view that I take is that it was not a bargain of purchase at all—not a bargain between vendor and purchaser, but merely a partial substitution of one trust asset for another at the discretion of the trustees. I think, having regard to the decisions that have been cited, that that transaction cannot properly be described as coming within the language of the section.

I think, therefore, that the trustee in bankruptcy is entitled to undo the second settlement, so far as is necessary to satisfy the claims of creditors against the estate of the bankrupt.

Solicitors : *Edward M. Lazarus*, for the Trustee in Bankruptcy.
Walters & Co., for the Trustees of the Settlement.

IN RE POWELL, POWELL v. POWELL.

1904, March 12, 16. SWINFEN EADY, J.

Bankruptcy—Liquidation by Arrangement—Close of Liquidation—Undischarged Debtor—After-acquired Property—Bequest to Debtor—Right of Executors to Retain Debt—Bankruptcy Act, 1869.

Section 54 of the Bankruptcy Act, 1869, which contains provisions dealing with the status of undischarged bankrupts, applies to liquidating debtors.

Ex parte Williams (1) followed.

Prior to 1882 a father had lent his son various sums of money amounting in the whole to 1,133*l.*, for which the son had given him a bill of sale on his furniture. In 1882 the son filed a petition under the Bankruptcy Act, 1869, for liquidation of his affairs by arrangement. In 1883 the liquidation was closed, but the creditors refused to grant the son his discharge. The father sold the property comprised in the bill of sale for 182*l.*, but did not prove in the liquidation for the balance of his debt. In 1903 the father died, having by his will bequeathed to the son a share of his residuary estate, which amounted to about 2,000*l.* The executors claimed to retain the balance of the debt out of the son's share.

Held, that section 54 of the Act of 1869 applied, that the debtor not having obtained his discharge, the balance of the debt was a subsisting debt, and that the debtor must therefore bring it into account, together with interest thereon, from the expiration of three years from the close of the liquidation until distribution.

THIS was an originating summons which raised the question whether upon the construction of the Bankruptcy Act, 1869, section 54 of that Act applied to the case of a liquidating debtor. The facts were as follows :

Prior to 1881 the testator had lent his son, R. E. Powell, various sums, and on 28 September of that year the son gave his father a bill of sale on his furniture as security for the sum of 1,133*l.* 9*s.* 6*d.*, which was then owing by him. The testator sold the property comprised in the bill of sale which realised 182*l.*, leaving a balance due to him of 951*l.* 9*s.* 6*d.*

On 28 February, 1882, R. E. Powell presented his petition for liquidation of his affairs. On 5 April, 1882, the first meeting of creditors was held, at which a liquidation by arrangement was resolved upon, and a trustee was appointed. On 31 May, 1883, a meeting of creditors was held, at which resolutions were passed approving the accounts, releasing the trustee, and closing the

(1) L. R. 20 Eq. 743 ; 44 L. J. Bk. 122.

liquidation, but no resolution was passed discharging the debtor. The testator never proved in the liquidation.

After the liquidation the testator made his son a small weekly allowance and paid the rent of his house. On 23 September, 1903, the testator died, having by his will and codicils thereto appointed the plaintiff and R. E. Powell executors thereof, and bequeathed to the latter a share of his residuary estate of the value of about 2,000*l*. The plaintiff, as one of the executors, took out the present summons asking whether the executors were entitled to retain out of the share of R. E. Powell in the residuary estate all or any of the sums paid to him by the testator, and also, if they were, whether they were entitled to retain out of the same share interest on such sums, and if so, at what rate, and for what period.

The Official Receiver made no claim to the property.

F. Whinney for the summons.

W. H. Cozens-Hardy and *A. R. Sargeant* for the defendant George Powell, representing the residuary legatees other than the defendant R. E. Powell:

The balance of 951*l*. was a subsisting debt at the date of the testator's death for which he could have sued. Although the liquidation has been closed the son has never received his discharge. He is, therefore, not entitled to receive his share under the testator's estate without bringing into account the debt with interest thereon at 4 per cent. from the expiration of three years from the close of the liquidation. Section 54 of the Bankruptcy Act, 1869 (2),

(2) Bankruptcy Act, 1869, s. 54, provides:

"Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

"(1) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time if he pay to his creditors such additional sum as

will, with the dividend paid out of his property during the bankruptcy make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property:

"(2) At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in

applies to liquidations by arrangement: *Ex parte Williams* [1875] (1), *In re Rees* [1889] (3).

The debt is outside the three years limit, and therefore outside the artificially protected period.

[They also referred to *Cherry v. Boulton* [1889] (4); *In re Watson* [1896] (5); *In re Orpen* [1880] (6).]

P. F. Wheeler for the defendant *R. E. Powell*:

Section 54 has no application in the present case. *Ex parte Williams* (1) did not so decide, nor did *In re Rees* (3). *Ebbs v. Boulton* [1875] (7) decided that where there has been a discharge but the liquidation has not been closed the discharge operated as a closure of the liquidation so as to protect the debtor as regards after-acquired property.

The converse case is true, viz., that where the liquidation is closed the debtor, although he has not received his discharge, is entirely released from his debts.

[He also referred to *In re Wainwright* [1881] (8); *In re Pettit's Estate* [1876] (9); *Jay v. Johnstone* [1892] (10); and *Palmer v. Hendrie* [1859] (11).]

Cozens-Hardy in reply:

The Act by section 49 expressly provided that a debt should be released by a discharge, and it cannot, therefore, be contended that

the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt,

or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in the manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

(3) 60 L. T. 260.

(4) 4 My. & Cr. 442; 9 L. J. Ch. 118.

(5) [1896] 1 Ch. 925; 65 L. J. Ch. 553; 74 L. T. 453; 44 W. R. 571.

(6) 16 Ch. D. 202; 50 L. J. Ch. 25; 43 L. T. 728; 29 W. R. 467.

(7) L. R. 10 Ch. 479; 44 L. J. Ch. 691; 33 L. T. 342; 23 W. R. 820.

(8) 19 Ch. D. 140; 51 L. J. Ch. 67; 45 L. T. 562; 30 W. R. 125.

(9) 1 Ch. D. 478; 45 L. J. Bk. 63; 34 L. T. 51; 24 W. R. 359.

(10) [1893] 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129; 41 W. R. 161; 4 B. 196; 57 J. P. 309.

(11) 27 Beav. 349.

the debtor was released by the closure of the liquidation. The right which the executors are seeking to enforce is not set off but retainer : *In re Smith, Green v. Smith* [1888] (12), *In re Akerman* [1891] (13). *Ex parte Williams* (1) has never been dissented from, and was approved of in *In re Smith* (12), at p. 679.

The Bankruptcy Discharge Act, 1887, which is applicable to a liquidation by arrangement would be unnecessary if the closure of the liquidation was equivalent to a discharge.

SWINFEN EADY, J., in dealing first with the second point raised, viz., as to the payments made to the debtor subsequently to the liquidation, said that taking into account the position and circumstances of the parties, it was reasonably clear that these payments could not be treated either as loans or advances, and the son could not therefore be required to bring them into account. His Lordship then stated the facts with reference to the first point, viz., as to the payments made prior to the commencement of the liquidation and continued : The first point is a question of law. *Mr. Cozens-Hardy* insists that the balance of the money advanced by the testator prior to the liquidation is a debt which is still owing and has never been discharged, and that it must, with arrears of interest on it, be brought into account in ascertaining the share of the son in his father's residuary estate. *Mr. Wheeler*, on the other hand, insists on the contrary view. He alleges that the fact that the debtor has not obtained his discharge does not make any difference. He says that if the discharge had been granted, but the liquidation proceedings had not been closed, the debtor would have been entitled to retain his after-acquired property : *Elbs v. Boulnois* (7). Then he argues that the converse ought to be true : viz., that although the liquidating debtor has not been discharged, yet, inasmuch as the liquidation has been closed, he ought to be entitled to his after-acquired property. That was equivalent to saying that there is no difference whether the debtor receives his discharge or not.

I will now consider the relative positions of a bankruptcy and a liquidation by arrangement. This is a liquidation. In the case

(12) 22 Ch. D. 586 ; 52 L. J. Ch. 411 ; 48 L. T. 154 ; 31 W. R. 413.

(13) [1891] 3 Ch. 212 ; 61 L. J. Ch. 34 ; 65 L. T. 194 ; 40 W. R. 12.

of bankruptcy, no doubt, if the bankrupt has been discharged but the bankruptcy has not been closed, he will be entitled to his after-acquired property; but the converse is manifestly not true. If the bankrupt has not obtained his discharge his after-acquired property will be liable to be taken, subject to the restrictions imposed by section 54 of the Bankruptcy Act, 1869: viz., that no portion of the debt is to be enforced against the property until three years after the close of the bankruptcy, and that the balance of unpaid debts after the expiration of that period are to be deemed judgment debts and enforceable against the property of the debtor with the consent of the Court. Why should there be a different rule in the case of liquidations by arrangement? If the rule is as it was contended it was, a liquidating debtor would escape all further liability in respect of unsatisfied debts. I am unable to see any principle on which a liquidating debtor ought to be released from those debts. Then does the Act on its true construction release him? Section 125 of the Act deals with liquidations by arrangement, and (sub-section 7) applies to liquidations all the provisions of the Act as to bankruptcy "with the modifications hereinafter mentioned." So that, unless there are modifications, the rules as to bankruptcy apply. A modification is found in sub-section 9, which provides that "the provisions of this Act, with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of a trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement. . . ." The provisions with respect to the close of the bankruptcy are to be found in section 47, headed "Close of Bankruptcy." The provisions as to the discharge of the bankrupt are to be found in sections 48, 49, and 50, and are headed "Discharge of Bankrupt." The release of a trustee is provided for by sections 51, 52, and 53, which are headed "Release of Trustee." Audit of accounts is dealt with by sections 55 to 58. There is, however, an intermediate section (section 54) headed "Status of Undischarged Bankrupt," and the question is whether that section applies to a liquidating debtor. It was pointed out that sub-section 1 spoke of the bankrupt not having obtained his discharge, and sub-section 2 of an "order of discharge," and it was argued that this showed that the language of the section was inapplicable to

a liquidation by arrangement, because the liquidating debtor when discharged was discharged by a resolution of the creditors passed at a meeting. But sub-section 10 of section 125 provides that "the trustee shall report to the Registrar the discharge of the debtor, and a certificate of such discharge given by the Registrar shall have the same effect as an order of discharge given to a bankrupt under this Act." If that provision is borne in mind section 54 is, in my opinion, applicable to the case of a liquidating debtor; and, although in the case of a liquidating debtor there is no analogous provision to sub-section 1 of that section, which provides for the payment of 10s. in the pound, yet sub-section 2 may, and in my judgment does, apply in such a case. If that is not so the Act contains no provision which applies to the case of a liquidating debtor who has not obtained his discharge.

Turning then to authority, shortly after the Act of 1869 came into operation the point arose in *Ex parte Williams* (1). There a liquidating debtor, who had not obtained his discharge, had contracted fresh debts and had filed a liquidation petition. The creditors met and resolved on a liquidation, but the Registrar refused to register the resolutions for liquidation because no notice of the meeting had been given to the creditors under the first petition. The Chief Judge in Bankruptcy held that no such notice was necessary, and that the resolutions ought to be registered, on the ground that the creditors under the first petition had no rights against the debtor's property except under the provisions of section 54 of the Act. That case has been treated in all the text-books as determining that point, see Robson on Bankruptcy (3rd ed.), p. 598. In Williams on Bankruptcy (2nd ed.), at p. 334, it is laid down that "where a liquidation is closed, but no discharge has been granted to the debtor, the rights of the creditors are governed by section 54." In 1889 the matter came before Mr. Justice KEKEWICH in *In re Rees, Rees v. Rees* (3). There the question was as to the right of executors to retain a legacy given to a legatee who was a liquidating debtor against a debt due by him to the estate, and the learned Judge held that, inasmuch as there was no debt which could be enforced until after the expiration of three years from the close of the liquidation, the executors could not

retain or set off the debt as against the legacy. So that he there treated section 54 as applying. And in *In re Watson, Turner v. Watson* (5), Mr. Justice NORTH referred to *In re Rees* (3) as deciding that there was no right of retainer.

There is, therefore, a general consensus of opinion that section 54 applies to the case of a liquidating debtor. The argument, therefore, put forward by the one of the residuary legatees on behalf of all must prevail, and the liquidating debtor must bring into account the balance of 951*l.*, owing from him to his father's estate with interest at 4 per cent. from the expiration of three years from the close of the liquidation until distribution. He will not have to bring in the rent and allowances.

Solicitors: *Sheffield, Son & Powell*, for the Plaintiff and the Defendant George Powell.

Finch & Turner, for the Defendant R. E. Powell.

NATAL LAND AND COLONISATION CO., LIMITED,
v. PAULINE COLLIERY AND DEVELOPMENT
SYNDICATE, LIMITED (1).

1908, November 4, December 2. P. C.

Company—Contract on Behalf of Intended Company—Subsequent Adoption of Contract by Company.

A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came existence. To obtain such benefit, a new contract must be entered into by the company in the terms of the old contract.

Kelner v. Baxter (2) approved.

THIS was an appeal from a decree dated 29 May, 1902, of the Supreme Court of Natal.

The facts are stated in the judgment.

Danckwerts, K.C., and *MacSwinney*, for the appellants :

There was no privity of contract between the appellants and the respondents. It is settled by a series of cases that where a person proposes to sign a contract as agent, but has no principal at the time, no subsequent adoption or ratification by another purporting to be a principal is operative. There must be a new contract in terms of the old.

Haldane, K.C., and *Boydell Houghton* :

By the alteration in the original contract authorised by Rycroft on 30 December, 1897, Mrs. de Carrey was empowered to substitute the syndicate for herself. She did so substitute the respondents by signing the articles of association, and this constituted a new contract in terms of the original contract.

Danckwerts, K.C., in reply.

LORD DAVEY delivered the judgment of their Lordships: The appellants are an incorporated joint-stock company, having their

(1) *Coram*, Lord Macnaghten, Lord Davey, Lord Lindley, Sir Arthur Wilson, and Sir John Bonser.

(2) L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 313; 15 W. R. 278; 12 Jur. (N.S.) 1016.

head office in London. Prior to and in the month of December, 1897, one Rycroft was their general manager in Natal under a power of attorney dated 26 October, 1888, by the terms of which he was empowered to sell and lease the company's lands in the colony and to make contracts for these purposes. On 9 December, 1897, Rycroft, on behalf of the appellants, made a contract with a Mrs. de Carrey respecting the coal-mining rights in 3,000 odd acres of land belonging to the appellants and known as the Coal Company's Lots. The terms of this agreement are contained in seven letters extending from 30 November to 9 December, 1897, between Rycroft and Messrs. Shepstone, Wylie and Binns, then acting as solicitors for Mrs. de Carrey. The material terms are as follows: First, Mrs. de Carrey was to have an option—that is, a right of prospecting for coal, for six months from 20 December, 1897, with power to extend the option for a further period of three months; secondly, the option was not assignable; thirdly, that Mrs. de Carrey should have the right, during the continuance of the option, to call for a lease of the coal-mining rights for a term of three years, subject to payment of certain rents and royalties, with power to extend the term to thirty-one years; fourthly, Mrs. de Carrey was to have the right to sell the lease to a joint-stock company fulfilling certain specified conditions; fifthly, Mrs. de Carrey was to pay or hand over to the appellants 25 per cent. of the value received from the sale of the lease, in shares or cash, or both, at the option of the appellants; sixthly, Mrs. de Carrey was to pay the appellants 100*l.*, to be forfeited in case the lease was not taken up, but to be repaid on compliance with certain conditions.

By an agreement dated 22 December, 1897, and expressed to be made between William Louch, "in his capacity as a provisional director of the Pauline Colliery and Developing Syndicate about to be registered . . . under the laws of the" South African "Republic," of the one part and Mrs. de Carrey of the other part, Mrs. de Carrey sold and purported to assign to Louch all her interest in (*inter alia*) the above option in consideration of 300*l.* cash and 10,000 shares in the syndicate. Rycroft was not informed of this agreement or of the assignment purported to be made by Mrs. de Carrey, and did not in fact know of it until 17 December, 1898.

On 29 December, 1897, the solicitors acting for Mrs. de Carrey

wrote to Rycroft requesting him, as (it was stated) Mrs. de Carrey was really acting as the nominee of the syndicate, to insert a new clause in the agreement giving her the right to cede and transfer all her rights in the option to the Pauline Syndicate on the condition that the syndicate should assume all the rights and obligations to the appellants under the agreement. And on the following day Rycroft wrote to the solicitors a letter containing the following passage: "I beg to say that it was understood at the time of making the agreement with Mrs. de Carrey that she and the original (or parent) syndicate were one and the same, therefore I could not have any objection to the Pauline Colliery and Developing Syndicate being substituted under section 4 of your letter of the 8th instant (Mrs. de Carrey's consent to the alteration, you assure me, has been obtained) for Mrs. de Carrey."

At this time Rycroft was not aware of the assignment to Louch which had already been made by Mrs. de Carrey by the agreement of 22 December, 1897, and he did not know what was the constitution of the so-called syndicate, or who were the persons who composed it, or what person he had agreed to substitute for Mrs. de Carrey. Their Lordships, however, will assume that the substitution was within his powers. The respondent company was not incorporated until 22 January, 1898, on which date it was registered as a joint-stock company with limited liability at Pretoria, under the laws of the late South African Republic. The 100*l.* payable under the agreement was paid to Rycroft by the unincorporated syndicate before the incorporation of the respondent company. This sum was subsequently (on 25 November, 1898) repaid by Rycroft to one Thurston by the order of Mrs. de Carrey.

On 31 January, 1898, Rycroft wrote to the solicitors of Mrs. de Carrey and the syndicate a letter containing a copy of a telegram which (he says) he had that morning received from the appellants' London office. The telegram was as follows: "Umhlali matter was not in accordance with instructions. Do nothing further. Inform Binns must wait Board's orders."

Binns was a member of the firm of Shepstone, Wylie and Binns, the solicitors for Mrs. de Carrey, the unincorporated syndicate, and the respondent company. Rycroft's comment on this telegram in his letter was, "I do not know what particular part of our

negotiations this may refer to, but if anything more is required of me by the Pauline Syndicate or Mrs. de Carrey I am bound by these instructions to await orders from the Board."

Their Lordships are of opinion that after this date Rycroft had no authority to make a new agreement, or to vary the existing agreement, or in any other way to bind the appellants in the matter.

The term was extended to 30 September, 1898, as provided in the agreement. The respondents had been engaged in boring for coal on an adjoining property, and did not prospect or bore for coal on the property of the appellants till shortly before the expiration of the extended term, and very little work appears to have been done. But on 15 September, 1898, the secretary of the respondents, by a letter of that date, informed Rycroft that his board was given to understand that his syndicate had struck a 3 ft. 8 in. seam of coal on the appellants' property at a depth of 293 feet, and claimed a lease to the respondents on terms of the correspondence between Rycroft and Messrs. Shepstone, Wylie and Binns, which they alleged constituted an agreement between the appellants and the respondents. Rycroft, on the same day, answered the letter, stating that he should send a copy of it to the London secretary of his company to be laid before the board for their instructions. On 12 December, 1898, Rycroft, acting under the instructions of the appellants' board, declined to entertain the claim, but offered to consider an application for a lease at the same rent and royalties, but subject to certain conditions. This offer was not accepted.

On 30 May, 1899, the respondents commenced the present action against the appellants for specific performance of the agreement contained in the seven letters dated 30 November to 9 December, 1897, or in the alternative for damages. In their declaration the respondents alleged that on 22 December, 1897, they acquired all the interest of Mrs. de Carrey in the agreement, but did not allege any other assignment to them or title to the benefit of the agreement.

The appellants in their plea to the declaration averred that there was no contract between the respondents and themselves, and alleged that the agreement to substitute the syndicate for Mrs. de Carrey was obtained from Rycroft by misrepresentation, the

misrepresentation charged being that Binns and Louch had represented that Mrs. de Carrey had been acting for the syndicate all through the negotiations, whereas the syndicate or Louch had purchased the benefit of the agreement from her for a large sum.

The Court, consisting of Mr. Justice FINNEMORE and Mr. Acting-Judge BEAUMONT, decided in favour of the respondents on both points, and by their judgment of 29 May, 1902, decreed specific performance of the agreement with costs. On the question of privity of contract they seem to have held that a new contract on the terms of the old one had been made between the appellants and the respondents. The acts of part performance which were relied on by the learned Judges as evidence of such new contract were the occupation and working of the land in question by the respondents, the expenditure of money on the faith of the agreement, and the acceptance by the appellants of the payment of 100*l.* as a guarantee for prospecting operations. This sum, however (as already stated), was in fact paid before the incorporation of the respondents.

Their Lordships do not think it necessary to say whether the agreement was or was not voidable on the grounds alleged or on other grounds appearing in the correspondence, because they are clearly of opinion that there was no contract between the appellants and the respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner v. Baxter* [1866] (2) downwards. But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract. The circumstances relied on for that purpose in the present case are not, in the opinion of their Lordships, necessarily referable to, and do not necessarily imply, a new contract with the respondents. But a conclusive reason which negatives any new contract is that Rycroft, by whose agency the new contract must be supposed to have been made, had no power or authority after 31 January, 1898, to make such a

contract on behalf of the appellants, and his want of authority was known to the solicitors acting for the respondents. He was not either the actual or the ostensible agent for that purpose of the appellants.

Their Lordships will therefore humbly advise his Majesty that the judgment of 29 May, 1902, ought to be reversed, and that, instead thereof, judgment ought to be given for the defendants in the action with costs. The respondents will also pay the costs of this appeal.

Solicitors : *Kimbers & Boatman*, for the Appellants.

Budd, Johnson & Jecks, for the Respondents.

IN RE TEA CORPORATION, SORSBIE v. TEA CORPORATION.

1903, November 23. C. A. VAUGHAN WILLIAMS, ROMER, AND STIRLING, L.JJ.

Company—Reconstruction—Scheme of Arrangement—Approval by Creditors—Dissentient Shareholders—Companies Act, 1862, s. 161—Joint-Stock Companies Arrangement Act, 1870, s. 2—Companies Act, 1900, s. 24.

A scheme of arrangement for the reconstruction of a company after providing for the claims of the debenture-holders and other creditors of the company, gave options to holders of preference and ordinary shares respectively to take shares in the new company credited as partly paid up in proportion to their holdings in the old company. There was evidence to the effect that if the assets were immediately realised there would be no balance available for meeting the claims of ordinary shareholders. At separate meetings of debenture-holders, creditors, and preference shareholders, three-fourths majorities in favour of the scheme had been obtained, but at the meeting of ordinary shareholders such a majority was not obtained :—

Held, that, notwithstanding that the scheme had not the approval of a three-fourths majority of the ordinary shareholders, the Court had power to sanction it as regards the creditors by virtue of the Joint-Stock Companies Arrangement Act, 1870, s. 2; and as regards the preference shareholders by virtue of the Companies Act, 1900, s. 24.

THIS was an appeal from an order of BUCKLEY, J., sanctioning a scheme of arrangement under the Companies Act, 1862 to 1900, for reconstruction of the Tea Corporation, Limited, whereby the assets

and liabilities of the company were to be transferred to a new company.

The company was incorporated on 24 July, 1897, with a nominal capital of 200,000*l.*, divided into 20,000 preference shares of 5*l.* each and 20,000 ordinary shares of 5*l.* each. All the shares had been paid up in full except 426, in respect of which there were calls in arrear amounting to 2,130*l.* The objects of the company were to acquire certain property in Ceylon, and to carry on the business of tea-planters. Shortly after its incorporation the company acquired various tea estates in Ceylon, of an area of over 7,000 acres.

In 1897 the company created 65,000*l.* of 5 per cent. first mortgage debenture stock, and the same was secured by a trust deed dated 20 December, 1897, made between the company of the one part and the Debenture Corporation and T. J. Lawrence, as trustees for the debenture-stock holders of the other part. The whole of this 65,000*l.* debenture stock was issued and remained outstanding. During 1902 the company was unable to keep down the interest upon the debenture stock, and this action was then commenced on behalf of the holders of debenture stock. BYRNE, J., made an order that the trusts of the trust-deed should be carried into execution, and a declaration of charge and an order for accounts and inquiries in the form usual in a debenture-holders' action.

On 12 May, 1908, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed.

Besides the 65,000*l.* owing in respect of the debenture stock, there was about 3,600*l.* owing for interest thereon, and 2,500*l.* for costs, charges, and expenses. There were unsecured creditors to an amount of upwards of 12,000*l.*

It being stated that the proceeds of the company's undertaking and assets, if realised in the liquidation or by the debenture-stock holders, or the trustees for the debenture-stock holders, would not exceed 70,000*l.*, and would be wholly insufficient to pay off the moneys owing to the debenture-stock holders and unsecured creditors of the company and costs of liquidation, and that in no event would there be any surplus for distribution among the contributories of the company, a scheme of arrangement was framed,

under the Joint-Stock Companies Arrangement Act, 1870, with the object of avoiding a realisation of the assets. This scheme was as follows:—

“1. A new company shall be formed under the Companies Acts, 1862 to 1900, as a company limited by shares with the same name as the present company or with such other name as may be determined by the liquidator with the approval of the Court.

“2. The capital of the new company shall be 70,000*l.*, divided into 70,000 shares of 1*l.* each. The objects of the new company shall include the acquisition and undertaking of all or any of the assets and liabilities of the present company. The memorandum and articles of association of the new company shall be framed in accordance with the draft which has already been prepared with the privity of the liquidator. The first directors of the company shall be Alfred Ball, Thomas James Lawrence, and Vivian Hugh Smith, or in case of the refusal or inability of any of the said persons to act as director some other person nominated in his place by the liquidator with the approval of the Court.

“3. The liquidator shall enter into an agreement with the new company for the adoption of this scheme by the new company, and for the transfer to the new company upon the footing and subject to the provisions of this scheme of the assets of the present company.

“4. The new company shall create first mortgage debenture stock charged by way of fixed charge on its immovable property in Ceylon and by way of floating charge on the rest of its undertaking, property and assets, and bearing interest at 4*l.* 10*s.* per cent. per annum as from the 1st July, 1903. The company shall be bound to redeem the stock at par on the 31st December, 1940. The amount of the stock shall be 52,000*l.* The trust deed securing the stock shall be framed in accordance with the draft already prepared with the privity of the liquidator. The trustees of the stock shall be the Debenture Corporation, Limited. The debenture stock is to be reduced to 40,000*l.*, by purchase or drawings as provided by the said draft deed, the new company for that purpose applying its profits up to at least 1,000*l.* per annum.

“5. The new company shall pay to each debenture stockholder of the present company a sum in cash equal to 20 per cent. of the

nominal amount of his holding and all arrears of interest thereon to the 1st July, 1908, and shall allot to him first mortgage debenture stock of the new company to the amount of 80 per cent. of his holding, and in exchange for such payment and for the certificate for such stock of the new company he shall surrender his debenture stock of the old company and deliver up his certificate for the same, and shall be deemed to accept such payment as aforesaid and the delivery of the certificate for the stock of the new company as complete satisfaction for all his claims in respect of the debenture stock of the old company.

"6. The new company will take over and discharge all the liabilities of the old company (other than its liabilities and interest on its debenture stock) and will pay and discharge all the costs, charges and expenses of the trustees of the deed securing the present company's debenture stock and of the receiver appointed by them and all the costs as between solicitor and client of all parties of the action, *Sorsbie v. Tea Corporation, Limited*, and also all the costs of and incidental to the winding-up and dissolution of the present company, including the costs of and incidental to this scheme and to carrying the same into effect.

"7. Each holder of the preference shares in the present company shall, in respect of each preference share of 5*l.* held by him, be entitled to claim an allotment of four shares of 1*l.* each in the new company, with a sum of 10*s.* per share credited as paid up thereon. Each holder of ordinary shares in the present company in respect of each such ordinary share shall be entitled to claim an allotment of one share of 1*l.* in the new company, with a sum of 10*s.* per share credited as paid up thereon.

"8. The new company shall not be bound to allot any shares hereunder to any person unless he shall, within three weeks from the time when this scheme shall be sanctioned by the Court, claim the allotment by writing addressed to the new company, and shall in respect of each partly paid share for which he shall apply pay 1*s.* on application. The balance on each such partly paid share shall be paid as to 4*s.* on allotment and as to 5*s.* within three months from allotment. The liquidator shall, within seven days after this scheme shall be sanctioned as aforesaid, give to each member notice thereof at his registered address.

"9. The liquidator of the present company shall sell for what they will fetch such of the above mentioned shares of the new company as the members of the present company shall be entitled to claim but shall not claim within the period aforesaid, and the new company shall allot the said shares to the purchasers, and the net purchase-money received by the liquidator for the said shares (after deducting expenses of sale) shall be distributed rateably amongst those shareholders who were respectively entitled to claim but did not within the period aforesaid claim such shares.

"10. As soon as may be conveniently after this scheme becomes binding the present company and the liquidator, and all other necessary parties, shall do and execute all such deeds and documents as may be necessary for the conveyance and transfer to the new company of the property of the present company in the terms of this scheme and for otherwise carrying this scheme into effect. Until the transfer to the new company of the business of the present company in pursuance of such deeds or documents the receiver and the liquidator shall be deemed to be carrying on the same on account of the new company as a going concern, but until the assignment and transfer the receiver and the liquidator shall be at liberty to discharge out of the same any debts and liabilities to be undertaken by the new company.

"11. All further proceedings in the action of *Sorsbie v. Tea Corporation, Limited*, shall be forthwith stayed.

"12. All further proceedings in the liquidation of the present company shall be stayed except such as may be necessary for carrying into effect this scheme or the order confirming the same.

"13. Unless (a) this scheme is adopted by the new company within three weeks after the sanction of this scheme by the Court, and (b) all the said shares to be allotted hereunder are duly allotted within six weeks after such sanction, the liquidator may, with the sanction of the Court, declare that the scheme has fallen through and thereupon the winding-up of the present company shall proceed in due course and all the other provisions of this scheme shall be at an end.

"14. The liquidator may assent to any modification in this

scheme or to any condition which the Court may think fit to approve or impose.

“ 15. Nothing in this scheme contained shall affect any charge, lien or security except as herein otherwise expressly provided.”

The liquidator of the company, in pursuance of an order of the Court, convened separate meetings of—first, the holders of mortgage debenture stock of the company; secondly, the unsecured creditors of the company; thirdly, the contributories holding preference shares; and fourthly, the contributories holding ordinary shares of the company, for the purpose of considering the scheme of arrangement.

These meetings were held on 9 July, 1903. At the meeting of debenture-stock holders the scheme was unanimously approved by those present in person or by proxy. The meeting of unsecured creditors was attended by five creditors whose debts amounted to upwards of 11,187*l.*, and they unanimously approved of the scheme. The meeting of preference shareholders was attended personally or by proxy by thirty-five contributories holding 6,545 preference shares, and twenty-three other contributories holding 822 preference shares were represented by persons whose proxies were stated to be irregular in form or otherwise defective. The scheme was approved by twenty holders of 5,173 preference shares, and nine persons holding 652 preference shares disapproved of the scheme. The twenty-three contributories holding 822 preference shares, who were represented by persons holding proxies stated to be defective, tendered votes against the scheme. The meeting of ordinary shareholders was attended, either personally or by proxy, by twenty-four contributories holding ordinary shares, whose holdings amounted to 1,958 shares, and twenty-nine other holders of ordinary shares amounting to 1,757 shares were represented by persons holding proxies stated to be irregular in form or otherwise defective. There voted in favour of the scheme eight holders of 1,269 ordinary shares, and sixteen contributories holding 689 ordinary shares disapproved of the scheme. The twenty-nine contributories holding 1,757 ordinary shares, who were represented by persons holding proxies stated to be defective, tendered their votes against the scheme.

It was submitted that as the company's assets, if realised, would

be insufficient to leave any surplus for distribution among the ordinary shareholders, the scheme ought to be sanctioned, notwithstanding the result of the meeting of ordinary shareholders.

Messrs. Anthony Gibbs and Son offered to purchase from the liquidator at the price of one penny per share any shares in the new company which the members of the company should not claim within the time allowed by the scheme.

The petition for approval of the scheme was heard by BUCKLEY, J., who confirmed the scheme subject to certain alterations, to give shareholders more time to come in.

H. G. Hemerde, an ordinary shareholder in the company, appealed.

Buckmaster, K.C., and Austen-Cartmell, for the appellant:

There has been no special resolution in support of this scheme by the ordinary shareholders under section 161 of the Companies Act, 1862. No such scheme as this has ever been sanctioned under the Joint-Stock Companies Arrangement Act, 1870, s. 2, or the Companies Act, 1900, s. 24 (1). The Act of 1870 provides that a compromise can be made between the company and its creditors, which, if approved by a three-fourths majority of creditors, will bind dissentient creditors. It has no application to contributories, whose rights remain unaffected. The effect of this scheme is to

(1) Joint-Stock Companies Arrangement Act, 1870, s. 2: "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the Companies Act, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct; and if a majority in number

representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

Companies Act, 1900, s. 24: "The provisions of section 2 of the Joint-Stock Companies Arrangement Act, 1870, shall apply not only as between the company and the creditors, or any class thereof, but as between the company and the members, or any class thereof."

affect the rights of contributories without giving them the protection of section 161 of the Act of 1862 as regards dissentient shareholders. The ordinary shareholders cannot be compelled to take shares in the new company. Under the Act of 1870 the Court cannot approve of a scheme so as to bind contributories, or deprive them of their rights under section 161 of the Companies Act, 1862: *In re Canning Jarrah Timber Co.* [1900] (2) and *In re Brownfields Guilds Pottery Society* [1898] (3). The assets of a company cannot be sold for shares in a new company, as is proposed here, except under the provisions of section 161. Shareholders who object can only be bound under that section, and the scheme cannot be approved by the Court unless the contributories are bound.

[VAUGHAN WILLIAMS, L.J., referred to *In re English, Scottish and Australian Chartered Bank* [1898] (4) and *In re London Chartered Bank of Australia* [1898] (5).]

Manby and *Mark Romer*, for other shareholders, supported the appeal.

A'Beckett Terrell, for the plaintiff in the action.

Clauson (*Eve, K.C.*, with him), for the liquidator and the company:

Unless the assets are worth a great deal more than the evidence shows, the ordinary shareholders have no real interest in the scheme at all. The Joint-Stock Companies Arrangement Act, 1870, s. 2 (1), makes the scheme when sanctioned binding on the liquidator and contributories.

Rowden, K.C., and *Gordon Brown*, for holders of debenture stock and the trustees of the trust deed, supported the scheme.

Buckmaster, K.C., replied.

(2) 7 *Manson*, 439; [1900] 1 *Ch.* 708; 69 *L. J. Ch.* 416; 82 *L. T.* 409.

(3) *W. N.* (1898) 80; 33 *L. J. N. C.* 426.

(4) [1893] 3 *Ch.* 385; 62 *L. J. Ch.* 825; 69 *L. T.* 268; 42 *W. R.* 4; 2 *R.* 574.

(5) [1893] 3 *Ch.* 540; 62 *L. J. Ch.* 841; 69 *L. T.* 593; 42 *W. R.* 14; 3 *R.* 696.

VAUGHAN WILLIAMS, L.J. : There are two questions of law raised in this case. With regard to the facts of the case, it seems to me that in substance there is little or no question. Mr. Justice BUCKLEY has found as a fact that the value of the company's assets is such as to negative the notion that the ordinary shareholders have any financial interest whatsoever in the assets of the company. Some further affidavits have been made going to show that Mr. Justice BUCKLEY was misinformed by the evidence before him as to what was really the value of those assets. But it is not denied that on the evidence before him the learned Judge arrived at a right conclusion, and, as regards the further evidence, I do not think that the affidavits ought to be read, and there is nothing to make us say that the conclusion of Mr. Justice BUCKLEY upon the question of fact was not a right conclusion.

As to the questions of law, the first question is this : It is said that the present scheme is a scheme which might have been carried into effect under section 161 of the Companies Act, 1862, and that, the scheme being of that character, you cannot sanction it under the Joint-Stock Companies Arrangement Act, 1870, unless in some way or other the dissentient shareholders are put in the position in which they would have been placed by a scheme carried out under section 161 of the Act of 1862. In my opinion that proposition is much too wide. It certainly was not adopted in the Australian cases to which allusion has been made, including the case of *In re English, Scottish and Australian Chartered Bank* (4) and the case of *In re London Chartered Bank of Australia* (5), in which the Court directed meetings of contributories to be held to consider proposed schemes of arrangement. But it is said that, although a scheme of this sort was recognised in those cases, yet they are not applicable to the present case because the state of the assets was such that if you converted the whole of the property and undertaking of the company into money there would have been no balance of assets to give to any one ; and really in giving to the ordinary shareholders of the old company an option to take up shares in the new company upon which a certain amount was to be credited as paid up, you were not transferring to those shareholders anything in consideration of their interest in the assets of the old company, but really that this was a gratuitous offer on the part of the creditors, who might have

disposed of the assets at once; and if that was done, and they had insisted on their strict rights, there would have been nothing left for any one else. That may be quite true. I assume it is so. But then it is said that in the present case it is common ground that if the company's assets were realised there would be something left for the preference shareholders. I agree that there will be something. It is contended that under the Act of 1870 you could not have adopted this course in such a case without having recourse to section 161 of the Act of 1862. I do not know how that may be. I must not be taken to assent to that. But I think it likely that under the Act of 1870 the Court would have refused in such a case its consent to such a scheme unless it had been satisfied that the ordinary shareholders had been consulted about it. But, be that as it may, we have now the Act of 1900, which, as it seems to me, removes any difficulty of that sort by section 24, which says that section 2 of the Act of 1870 shall apply as between the company and the members or any class thereof. It seems to me quite plain, when you consider those words, that the Legislature intended that the shareholders should have a voice in a manner similar to that under which the creditors had a voice under the Act of 1870, and that they should be bound in the same way. Under the Act of 1870 the creditors were to be divided into classes, and each class was to vote separately. Under section 24 of the Act of 1900 the shareholders are to be dealt with in the same way. In the present case the shareholders were divided into classes—preference shareholders and ordinary shareholders—and they voted in those classes, and the majority of the preference shareholders were in favour of the scheme.

It is said, however, that this scheme is rendered defective because a majority of the ordinary shareholders did not vote in favour of it. I think the right answer to this was that given by Mr. Justice BUCKLEY. You are to divide the shareholders into classes, and when you take the class of preference shareholders you find that they have an interest in the assets of the company. But when you come to the ordinary shareholders you find that they have no interest whatsoever in those assets, and Mr. Justice BUCKLEY was of opinion that, having regard to that fact, their dissent from the scheme was immaterial. I think that that judgment is quite correct.

It seems to me that by the very terms of section 24 of the Act of 1900 you have a right to divide the shareholders into classes and to call meetings of the shareholders of each class, and that you ought not to consider the votes of those classes who really have no interest at all. It would be very unfortunate if a contrary view had to be taken, because you might have ordinary shareholders who had no real interest in the assets of the company who might be put in a position to say that, although the creditors and all those who had a real interest in it had passed the scheme, it should not be carried into effect unless some terms were made with them.

In my opinion, the decision of the learned Judge in the Court below was right, and the appeal must be dismissed.

ROMER, L.J. : I agree so far with the appellants that if you were to look only at the scheme of arrangement as prepared, and did not know the facts of the case, you would gather from it that the scheme did involve an arrangement or compromise between the company and the ordinary shareholders.

But there is nothing express upon the face of the scheme to that effect, and I do not think that the supporters of this scheme can be said to be in any way estopped from setting forth the true facts of the case and showing—first, that the ordinary shareholders have in fact no interest at all in the assets of the company; and secondly, that this scheme is really only proposed as an arrangement as between the company and the creditors of the company and as between the company and the preference shareholders, leaving out the ordinary shareholders as having no interest in the matter. I understand that Mr. Justice BUCKLEY, dealing with the facts before him as to the value of the company's assets, came to the conclusion that the ordinary shareholders had no interest in those assets, and I cannot gather from the appellants' counsel that substantially the Judge was wrong in coming to that conclusion.

Having regard to the facts and admissions made in the Court below, I think that the learned Judge was entitled to draw the inference that he did—namely, that the ordinary shareholders had no interest; and I desire to say that my opinion is likewise based solely on that ground. Therefore, if that be so, I see no difficulty in disposing of the case, because, if the scheme can be treated as

a scheme of arrangement between the company and its debenture-holders, it is sanctioned by the Act of 1870, and as regards the preference shareholders by the Act of 1900. It is true that under the scheme the ordinary shareholders had some shares in the new company offered to them. But I think that this must be treated as something in the nature of a gift from the debenture-holders and the preference shareholders to the ordinary shareholders, and not as something that the ordinary shareholders are entitled to lay hold of as showing that they had an interest in the equity of redemption. Certainly the appellants cannot be heard to complain because shares were given to them which but for the scheme they would not have a right to claim at all.

That being so, it seems to me to be solely a question of fact whether the ordinary shareholders have or have not an interest in the assets of the company. There is no appeal on behalf of the debenture-holders and the preference shareholders from the provisions of the scheme with respect to the offer of shares to the ordinary shareholders, and I think that the scheme was rightly sanctioned by Mr. Justice BUCKLEY.

STIRLING, L.J.: I am of the same opinion. In this case there are three classes of persons who claim an interest in the assets of the company. The first class consists of creditors and debenture-holders, the second of preference shareholders, and the third of ordinary shareholders. Having regard to what occurred in the Court below, I think that it must be taken that the assets of the company are not more than sufficient to meet the claims of the first and second classes of persons. The ordinary shareholders have no interest. In that state of things it seems to me that it was within the powers of the Court to sanction the scheme as regards the creditors under section 2 of the Act of 1870, and as regards the preference shareholders under that Act, combined with section 24 of the Act of 1900.

But then there are certain options given by the scheme to the ordinary shareholders, and it is objected that the inference is that they have an interest in the assets of the company. What is said in answer to that is that in substance the scheme is one which really deals only with the creditors and the preference

shareholders, and that the option given to the ordinary shareholders is really a concession to them on the part of the preference shareholders. It was left to the ordinary shareholders to apply for shares if they see fit, leaving the preference shareholders and the creditors their rights under the scheme. That seems to me a concession in favour of the ordinary shareholders which the preference shareholders were entitled to make, though whether this option could have been given against the wish of the preference shareholders is another question. But I think it is not a matter of which the ordinary shareholders can complain. In my opinion, therefore, the decision of Mr. Justice BUCKLEY should be supported.

Appeal dismissed.

Solicitors : *R. R. G. Norman*, for the Appellant and Shareholders supporting the appeal.

W. Shewell Morris, for the Plaintiff.

S. J. R. Stammers ; Linklater, Addison, Brown & Jones, for the Respondents.

IN RE WELSBACH INCANDESCENT GAS LIGHT
CO., LIMITED.

1908, December 15, 16. C. A. VAUGHAN WILLIAMS, ROMER,
AND STIRLING, L.JJ.

Company—Memorandum of Association—Different Classes of Shareholders—Rights inter se Defined by Memorandum—Reservation of Power to Modify—Validity—Reduction of Capital.

The memorandum of association of a limited company provided that the capital should be divided into preference, ordinary, and deferred shares, and prescribed the rights and privileges of the different classes of shareholders *inter se*, and provided—clause 6 (*f*)—that the rights for the time being attached to the several classes of shares respectively might be modified or dealt with in the manner mentioned in article 52 of the accompanying articles of association, but not otherwise, and that clause should be deemed to be incorporated therein:—

Held, that the provision in clause 6 (*f*) was a valid provision, and resolutions for the reduction of the capital of the company involving an alteration in the rights of the preference shareholders as regards the ordinary shareholders, which had been sanctioned as required by article 52, could be confirmed by the Court if not unfair in other respects.

Ashbury v. Watson (1) distinguished.

THIS was an appeal from a decision of BUCKLEY, J., confirming resolutions for the reduction of the capital of the company.

The company was incorporated on 9 December, 1897. The memorandum of association provided (clause 5) that the capital of the company was to be 3,500,000*l.*, divided into 300,000 preference shares of 5*l.* each, 1,350,000 ordinary shares of 1*l.* each, and 650,000 deferred shares of 1*l.* each. Clause 6, sub-clauses (*a*) to (*d*), provided that the rights following should be attached to the shares *inter se*: The preference shares should confer the right to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the capital for the time being paid up thereon respectively, and should rank both as regards such dividend and as to capital in priority to all other shares in the original capital, but should not confer any further right to participate in profits or assets. Subject as aforesaid, the ordinary shares should confer on the holders the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and should rank both as

(1) 30 Ch. D. 376; 54 L. J. Ch. 985; 54 L. T. 27; 33 W. R. 882.

regards such dividend and as to capital next after the preference shares. Subject as aforesaid, the deferred shares should confer the right to a fixed cumulative dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon respectively, and should rank both as regards such dividend and capital next after the ordinary shares. Subject as aforesaid, any profits which it might at any time be determined to distribute amongst the members, and in a winding-up any surplus assets after repayment of capital, should be divided as to one-half between the holders of the ordinary shares in proportion to the ordinary shares held by them respectively, and as to the other half among the holders of the deferred shares in proportion to the deferred shares held by them respectively.

Sub-clause (f) was as follows: "The rights for the time being attached to the said several classes of shares respectively may be modified or dealt with in the manner mentioned in clause 52 of the accompanying articles of association, but not otherwise, and that clause and also clauses 157 and 159 of the said articles shall be deemed to be incorporated herein and have effect accordingly."

The articles of association provided that the company might convert any paid-up shares into stock, the power to be exercised by resolution of the directors, and, as altered by subsequent special resolution, that the stock might be reconverted and divided into shares of any denomination; that the company in general meeting might from time to time increase the capital by the creation of new shares, and might from time to time by special resolution reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares or otherwise as might seem expedient.

Article 52 was as follows: "Whilst the capital is divided into different classes of shares, all or any of the rights and privileges attached to each class may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided that such agreement (1) is ratified in writing by the holders of at least two-thirds of the issued shares of that class, or (2) is ratified by an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class, and all the provisions hereinafter contained as to general meetings shall,

mutatis mutandis, apply to every such meeting, but so that the quorum thereof shall be members holding or representing by proxy two-thirds of the issued shares of the class."

Article 157 authorised the liquidators, if the company should be wound up, to divide among the contributories, with the sanction of a special resolution, any part of the assets of the company in specie, giving preferential or special rights to any class, or excluding any class either altogether or in part; and article 159 contained similar provisions with reference to the distribution or appropriation of the shares, cash, or other benefits to be received on any sale or arrangement under section 161 of the Companies Act, 1862.

The articles also provided that (123) the company in general meeting might declare a dividend to be paid to the members according to their rights and interests in the profits; (124) no larger dividend should be declared than was recommended by the directors, but the company in general meeting might declare a smaller dividend; (125) no dividend should be payable except out of the profits of the company, and the declaration of the directors as to the amount of the profits of the company should be conclusive; (126) the directors might from time to time pay to the members on account of the next forthcoming dividend such interim dividends as in their judgment the position of the company justified.

All the preference and all the ordinary shares were issued and paid up in full. Of the deferred shares only 629,589 were issued, and they were paid up in full. The preference and ordinary shares were converted into preference and ordinary stock respectively, and were both afterwards reconverted into 1*l.* shares. In May, 1903, three agreements, as provided by clause 52 of the articles, were entered into between the company and a person representing each class of shareholders respectively, and these agreements were afterwards respectively duly ratified. The agreements sanctioned the passing by the company of special resolutions to carry out a proposed scheme for the reduction of the capital of the company on the ground that capital to the amount of 2,134,589*l.* had been lost or was unrepresented by available assets, and also sanctioned the modification of the rights and privileges attached to the three classes of shares so far as to allow the said special resolutions to

be passed and have effect. Special resolutions adopting this scheme were passed at an extraordinary general meeting of the company held on 27 May, 1903, and confirmed at an extraordinary general meeting held on 11 June, 1903.

The resolutions, so far as material, were as follows: "That the capital of the company be reduced to 1,345,000*l.*, divided into 1,500,000 preference shares of 13*s.* each, and 1,350,000 ordinary shares of 5*s.* each, and 650,000 deferred shares of 1*s.* each, and that such reductions be effected as follows: (1) By cancelling paid-up capital which is unrepresented by available assets to the extent of 7*s.* in respect of each of the preference shares, and by reducing the nominal amount of such preference shares accordingly to 13*s.* each; (2) by cancelling paid-up capital which is unrepresented by available assets to the extent of 15*s.* in respect of each of the ordinary shares in the company and by reducing the nominal amount of such ordinary shares to 5*s.* per share; (3) by cancelling paid-up capital which is unrepresented by available assets to the extent of 19*s.* in respect of each of the outstanding deferred shares in the company, and by reducing the nominal amount of such deferred shares and of the unissued deferred shares to 1*s.* per share.

"And that the articles of association of the company be altered by adding at the end thereof the following additional provisions (that is to say), special provisions in relation to the reduction of capital resolved on in 1903:

"168. A special resolution having been passed in the year 1903, for reducing the capital of the company, and it being intended forthwith to petition the High Court for the confirmation of such resolution, and it being expedient to bring the regulations of the company into accord with the new circumstances accordingly, the following provisions shall have effect:

"(1) Immediately after the time when the order confirming the said special resolution, and the minute approved by the Court shall have been registered, in accordance with section 15 of the Companies Act, 1867, the directors shall by resolution consolidate the preference shares into preference stock and the ordinary shares into ordinary stock, and shall thereupon by resolution divide each holding of preference stock into two sections, viz.: one of 6 per

cent. cumulative preference stock, and the other of ordinary stock, such sections bearing the same ratio to each other as 40 to 25, and the directors shall by resolutions reconvert the said stock of each class into shares of 1*l.* each, and shall thereupon by resolution convert the deferred shares, if any, into ordinary stock, and upon such conversion shall reconvert such ordinary stock into ordinary shares of 1*l.* each, to the intent that the capital might consist in part of 600,000 6 per cent. cumulative preference shares of 1*l.* each, and in part of ordinary shares of 1*l.* each, conferring the rights specified in paragraph 2 of this clause. (2) As from the time when the said order and minute shall have been registered as aforesaid, the profits of the company from time to time available for dividend shall be applicable as follows: (1st) to the payment of the cumulative dividend on the preference shares or stock as from the registration aforesaid; (2ndly) to the payment of a dividend on the ordinary shares or stock; (3) as from the time when the said order and minute shall have been registered as aforesaid, the surplus assets available for distribution amongst the members in a winding-up shall be applicable, first, to the payment off of the preference shares or stock at the rate of 150*l.* for every 100*l.* of such stock; and, secondly, the surplus shall be divided amongst the holders of the ordinary shares or stock rateably in proportion to the amount of such shares or stock held by them respectively; (4) the provisions hereby made in regard to the rights of the members of each class as regards dividends and distribution of assets in a winding-up shall take effect by way of modification of the rights originally attached thereto, and accordingly such members shall not be entitled to any rights inconsistent therewith, and in particular all arrears of undeclared dividends up to the time when the said order and minute shall be registered shall be extinguished."

The company presented a petition that the reduction of capital effected by the above resolutions might be confirmed by the Court. It was alleged that no dividends had been paid on the preference or ordinary shares since March, 1900, and no dividends on the deferred shares since March, 1898. BUCKLEY, J., confirmed the resolutions. He was of opinion that the alleged loss of capital had been proved, and that the reduction proposed was in

accordance with the strict legal rights of the parties, having regard to the power of modification contained in the memorandum of association, and that there was nothing unfair or inequitable in the scheme.

Certain holders of preference shares appealed.

Younger, K.C., and *A. R. Kirby*, for the appellants :

The rights of the preference shareholders were defined by the memorandum of association. They are conditions attached to the shares by the memorandum, and cannot be altered, that being in contravention of section 12 of the Companies Act, 1862: *Ashbury v. Watson* [1885] (1) and *Collins v. Birmingham Breweries* [1899] (2). That view is borne out by *Andrews v. Gas Meter Co.* [1897] (3), and *Underwood v. London Music Hall, Limited* [1901] (4). Provisions as to division of capital into ordinary and preference shares need not be put into the memorandum, and then the company may have power to make regulations from time to time by its articles varying the rights; but if the provisions are put in the memorandum they are binding, and cannot be altered. These resolutions, therefore, ought not to be confirmed. The scheme is not confined to reduction of capital, but involves the addition of article 163 to the articles, and that, they submit, is *ultra vires*, having regard to the memorandum. Without that the reductions had not been agreed to by any one.

[VAUGHAN WILLIAMS, L.J., referred to *Allen v. Gold Reefs of West Africa* [1900] (5).]

Apart from that, assuming that there has been the loss alleged, the mode in which the reduction of capital is distributed over the different classes of shares is, under the circumstances, inequitable. It is not a matter of right, but of justice. A scheme which does not provide uniform treatment for shareholders of the same class will

(2) 15 Times L. R. 180.

(3) [1897] 1 Ch. 361, 371; 66 L. J. Ch. 246, 250; 76 L. T. 132; 45 W. R. 321.

(4) 8 Manson, 396; [1901] 2 Ch. 309; 70 L. J. Ch. 743; 84 L. T. 759; 49 W. R. 507; 17 Times L. R. 517.

(5) 7 Manson, 417; [1900] 1 Ch. 656; 69 L. J. Ch. 266; 82 L. T. 210; 48 W. R. 452.

be scrutinised very carefully by the Court. It does not necessarily follow that the Court will not sanction it: *British and American Trustee and Finance Corporation v. Couper* [1894] (6); but it must be satisfied that it will not work unjustly: *In re Barrow Hæmatite Steel Co.* [1900] (7). Not only are the preference shares reduced before the ordinary, but some of them are reduced to the level of ordinary. There was no necessity or justification for that. The ordinary shareholders receive the larger part of the profits if the company is a success, and they should bear the chief burden of the loss.

[VAUGHAN WILLIAMS, L.J.: We should like to hear the respondents as to the necessity or expediency of making the very large alterations in the rights of the preference shareholders which are made by this scheme.]

Eve, K.C., and Martelli, for the company:

The majority of the preference shareholders have agreed to the scheme. Some of them may have held ordinary shares as well; but the company's business was in a bad condition, and unless the shareholders had come to some agreement it would probably have never recovered as it has. The scheme was arranged after long conferences of the shareholders of the three different classes. The ordinary shareholders could not have carried the resolutions without the preference shareholders, but the preference shareholders wanted the help of the ordinary, and the majority of them presumably thought it to their interest to make the sacrifices that they did in the hope of improving the state of the company. It was a matter of bargain.

[They were stopped by the COURT, and the question as to whether the company had sustained the loss alleged was gone into.]

VAUGHAN WILLIAMS, L.J.: In our judgment this appeal fails. I do not know that there is much to be said, as far as I am concerned, excepting that I entirely agree with the judgment of Mr. Justice

(6) 1 Manson, 256; [1894] A. C. 399, 406; 63 L. J. Ch. 425, 429; 70 L. T. 882; 42 W. R. 652; 6 R. 146.

(7) 9 Manson, 35; [1900] 2 Ch. 846; 69 L. J. Ch. 869; 83 L. T. 397.

BUCKLEY, and for the reasons that he gives in support of that judgment.

There are really only two points for consideration: One is the proof of the loss. If you go through the figures, and deal with them as Mr. Justice BUCKLEY has done, there cannot be any doubt but that the loss has been proved. [His Lordship referred to one item of loss, and continued:] If one assumes the loss proved, there is very little else to say in the matter. If the memorandum of association of a company gives to a class of shareholders certain privileges and rights unconditionally, then I agree to the full that the case of *Ashbury v. Watson* (1) is conclusive to show that the privileges so unconditionally given by the memorandum of association cannot be altered or modified. But that is not this case. The present is a case where, so far from the privileges being given unconditionally, it is perfectly obvious that they are given conditionally. The conditions are to be found in sub-clause (f) of clause 6 of the memorandum of association; and it seems to me that all the proper steps have been taken in detail to bring about the modification of the rights and privileges of the preference shareholders. Under those circumstances, I see no sort of reason why the sanction of the Court to this scheme should be refused upon the ground that the scheme in any way alters the rights of the preference shareholders. The rights of the preference shareholders, as pointed out by Mr. Justice BUCKLEY, are now those which have been brought about by the modification mentioned, and the scheme is in no way consistent with those rights.

That being so, the only matter left to consider is, whether or not the scheme is unfair. I entirely agree with Mr. Justice BUCKLEY that, whether a scheme accords or does not accord exactly with the rights of the shareholders, one may always consider whether it is a fair scheme or an unfair scheme. In my judgment, this is a fair scheme. I cannot help mentioning—although it is in no way conclusive upon the question of fairness—that one always takes into consideration the wishes of those of the shareholders who are affected by the scheme; and in this case the majorities which have been obtained, to my mind, go far to show that at all events the shareholders, and in particular the preference shareholders, regarded this scheme as a fair scheme. After all, so far as these

modifications are concerned, they only involve that which might have been brought about and have bound the preference shareholders even though there has been no scheme in the air at all affecting them.

I think, under those circumstances, we ought to affirm the judgment of Mr. Justice BUCKLEY with costs.

ROMER, L.J.: I agree that this appeal must be dismissed. The only point really in the case is that argued on behalf of the appellants, that the provision in clause (f) of the memorandum of association was invalid. In my opinion that provision is a perfectly good one. The rights and privileges of the different classes of shares *inter se* constitute a matter not specially provided for by the Legislature. There is no reason why those rights and privileges should not be altered from time to time, or why such alteration should not be duly provided for. The question is not like one concerning the objects of the company, or the total amount of the capital of the company. It is provided by the Companies Act of 1862 that those matters must be fixed by the memorandum of association. They must be specified in the memorandum, and cannot be changed at the will of the company. But, as I have pointed out, there is no legislative provision as to the rights and privileges of the different classes of shareholders *inter se*, and the company may properly provide for any modification of those rights and privileges either by the articles or in the memorandum of association.

There was a fallacious argument adduced on behalf of the appellants. It was said that the rights and privileges of the preference shareholders were fixed by the provisions contained in the memorandum of association, clause 6, sub-clauses (a) to (d) inclusive, and that those clauses constitute a condition of the memorandum of association which could not be altered at all. The answer to that argument is perfectly clear. The condition as to the rights and privileges of the preference and ordinary shareholders contained in the memorandum is not that limited by sub-clauses (a) to (d), but is that provided for by sub-clauses (a) to (d) *plus* that contained in sub-clause (f). I have no doubt myself whatever but that the provision in sub-clause (f) is a perfectly valid condition,

and, that being so, the whole argument of the appellants on this appeal substantially goes by the board, and the appeal must fail.

STIRLING, L.J. : I am of the same opinion. The main argument in this Court has been on a point which, as I understand, was not made before Mr. Justice BUCKLEY and certainly is not dealt with in his judgment. It is a contention that one of the clauses of the memorandum of association—sub-clause (f) of clause 6—is really beyond the powers of the company. It was decided in *Ashbury v. Watson* (1), before the Court of Appeal, that where the memorandum of association of the company stated that a portion of the shares were to have a right of receiving a preferential dividend, and there was no power to modify that contained in the memorandum of association, that was a condition which could not be altered by the company, having regard to the provisions of section 12 of the Companies Act, 1862, which provides that, except as specially provided, no alteration is to be made by any company in the conditions contained in the memorandum of association. This provision in the memorandum of association in *Ashbury v. Watson* (1) was held to be a condition which could not be altered. By that I am bound, and from that I have no desire to depart; but how does it apply to the present case? It is said that sub-clauses (a), (b), and (c) of clause 6 define the rights and constitute conditions within the meaning of the decision in *Ashbury v. Watson* (1), and so they do. Then it is said that sub-clause (f) is one to which effect is not to be given. There I part company with the argument. Clause 6 provides that the rights shall be attached to the shares subject as provided, and if sub-clauses (a), (b), and (c) are conditions within the meaning of the decision in *Ashbury v. Watson* (1), sub-clause (f) is equally a condition within the meaning of that decision, and of section 12 of the Companies Act, 1862. The same document which confers a preference on these classes of shares contains also provisions which make the rights and priorities of the preference shareholders capable of alteration; and, unless it can be established that such a stipulation is forbidden by law, effect must be given to it as well as to the other conditions.

How is it made out that the provision contained in sub-clause (f) is forbidden by law? There is certainly no decision to that effect. No provision has been pointed to in the Companies Acts which says that that shall not be done. It is said that such a clause could not be inserted with reference to the objects for which the company is to be established. I agree that in that case there would be a difficulty with respect to such a clause, because section 8 of the Act of 1862 specifically provides that the memorandum of association shall contain certain things, and amongst others the objects for which the proposed company is to be established. That is a provision of the Act of Parliament which must be complied with in substance and not merely in form. A memorandum which contained a provision that the objects of the company should be such, for example, as the company might from time to time in general meeting determine, would not be a compliance with that section of the Act. Again, if the memorandum provided that the objects of the company should be certain specified objects numbered *a*, *b*, and *c*, and so on to the end of the alphabet, and then wound up with a general clause "and such other objects as the company might in general meeting determine," that, it seems to me, would equally fail to comply with the requirements of the statute, and therefore, for that reason, would be invalid. But the Legislature has not thought fit to require that the company should in its memorandum of association state definitely anything as to the priorities of the different classes of shares into which the capital may be divided. All that section 8 requires to be stated with regard to capital is the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. That requirement of the Legislature is satisfied by clause 5 of the memorandum of association in the present case.

In these circumstances it seems to me that there is nothing which entitles the Court to say that such a clause as sub-clause (f) of clause 6 is forbidden by law, and, in fact, I think that if we were so to hold, we should be departing from what is laid down by the Court of Appeal in *Andrews v. Gas Meter Co.* (3). There the memorandum of association stated that the nominal capital of the company was 60,000*l.*, divided into 600 shares of 100*l.*, each, every share being sub-divisible into fifths, with power to increase

the capital as provided by the articles of association. The company issued preference shares in accordance with the articles of association, and it was held that that was valid. Lord Justice LINDLEY, in giving the judgment of the Court, after referring to the case before Sir GEORGE JESSEL of *Harrison v. Mexican Railway* [1875] (8), and two cases before the Court of Appeal, *In re South Durham Brewery Co.* [1885] (9) and *In re Bridgewater Navigation* [1888] (10), says: "These decisions turned upon the principle that although by section 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised, are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which, (unless provided for by the memorandum, as in *Ashbury v. Watson* (1)), may be determined by the company from time to time by special resolution, pursuant to section 50 of the Act." If that was the principle on which *Andrews v. Gas Meter Co.* (3) was decided, it seems to me that it applies here, because here we have really this, that the rights of the various classes of shareholders are made subject to alteration by reference to the articles of association.

On these grounds I think that the point which was raised by the appellants ought not to prevail, and in other respects I agree with the judgment of Mr. Justice BUCKLEY. The only point which strikes one with regard to the fairness of the arrangement is this—that it does at first sight seem as if the rights of the preference shareholders had been somewhat seriously trenching upon; but when we find such a clause in the articles of association as article 52, and when we find that these alterations in the rights of the various classes of shareholders have been considered, first of all, by a committee consisting of business men, chosen by the shareholders themselves, and that they have been sanctioned by large majorities at the various meetings which have been held, it would require a very strong case for this Court to interfere. I quite agree with

(8) L. R. 19 Eq. 358; 44 L. J. Ch. 403; 32 L. T. 82; 23 W. R. 403.

(9) 31 Ch. D. 261; 55 L. J. Ch. 179; 53 L. T. 928; 34 W. R. 126.

(10) 39 Ch. D. 1; 57 L. J. Ch. 809; 58 L. T. 476; 36 W. R. 769.

what has been said both by Mr. Justice BUCKLEY and in this Court on the present occasion, that in all these cases the Court is not under an obligation to confirm any scheme, by whatever majorities it may be sanctioned, but has a discretion which it is bound to exercise in a proper case; but, at the same time, in exercising that discretion, where we find that the determination of such questions as the variations in rights to attach to different classes of shareholders has been left to be decided by the shareholders themselves, the Court ought to be very careful not to interfere with the *bonâ fide* judgment of business men on a matter of business in which they themselves are largely interested. The only suggestion of importance which has been made here is that the shareholders in voting were under the influence of a statement which was made in a circular issued by the directors, that if this course was not adopted the payment of the dividends would be indefinitely postponed. Now, when one looks at the articles of association, and finds, as in article 123, that it is left to the company to determine what amount shall be distributed amongst the members in the way of dividends, and that, as in article 124, no larger dividend shall be declared than is recommended by the directors, and we also find that the directors have taken the view that in the present state of the authorities it would be unwise for them to act upon the authority of cases which are binding on this Court, though they have not received finally the sanction of the House of Lords, it is impossible to say, it seems to me, that that was a statement which was such a departure from the law as to compel us to say that the sanction had been obtained unfairly. I think it was a matter which might reasonably and properly be taken into consideration by those to whom that circular was addressed.

As I have said already, on these points I agree with what has been said by Mr. Justice BUCKLEY, and I think therefore that the appeal fails.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*, for the Appellants.

Francis & Johnson, for the Respondents.

CORNBROOK BREWERY CO. *v.* LAW DEBENTURE
CORPORATION.

1908, November 16, December 21. C. A. VAUGHAN WILLIAMS,
ROMER AND STIRLING, L.JJ.

*Company—Debenture Stock—Covering Deed—Sub-demise to Trustees—“Creation”
of Charge—Registration—Companies Act, 1900, s. 14.*

Debenture stock was secured by a covering deed made in 1897, under which the proceeds of sale of any specifically mortgaged property and the property on which the same should be invested were to be held by the trustees upon the trusts of the covering deed. A leasehold public-house was subsequently purchased out of the proceeds of sale of certain of the specifically mortgaged property, and was in August, 1902, sub-demised by the company to the trustees, to be held by them upon the trusts of a covering deed:—

Held, that the sub-demise was a “mortgage or charge” created by the company upon the property thereby sub-demised, and consequently required registration under section 14, sub-section 1 of the Companies Act, 1900.

Decision of BYRNE, J. (1), affirmed.

THIS was an appeal from a decision of BYRNE, J. (reported in 10 Manson, 321), in an action in which the Cornbrook Brewery Co. claimed a declaration that an indenture dated 18 August, 1902, and made between the plaintiff company of the one part, and the defendants, the Law Debenture Corporation, of the other part, being an indenture of sub-demise by the plaintiff company to the corporation as the trustees under a debenture trust deed dated 17 February, 1897, of certain hereditaments in the city of Manchester upon the trusts declared by the said trust deed, did not require registration under the Companies Act, 1900.

The plaintiff company had issued 140,000*l.* debenture stock, which was secured by the covering deed dated 17 February, 1897, and which therefore did not require registration under the Companies Act, 1900. In the interpretation clause it was provided that in the deed the words “the specifically mortgaged premises” meant “the hereditaments and premises specified or referred to in the second schedule hereto and which are to be assured to or vested in the trustees in accordance with clause 8 hereof and any other hereditaments assets and premises which may become vested in

the trustees in pursuance of the provisions hereinafter contained or which ought to be so vested," and "the mortgaged premises means and includes the specifically mortgaged premises and the general assets collectively." The company were by clause 8 to assure to and vest in, or cause or procure the freehold and leasehold hereditaments specified in the second schedule to be assured to and vested in, the corporation upon the trusts of the deed. By clause 9 the company, as beneficial owners, charged in favour of the trustees the specifically mortgaged premises with the payment of the stock and interest thereon, and all other moneys intended to be thereby assured as a specific charge, and not as a floating charge. By clause 11, the assets and undertakings of the company other than the specifically mortgaged premises, but including uncalled capital, were charged with payment of the stock and interest as a floating security. Clause 22 gave the trustees power at the request of the company to sell or lease any part of the mortgaged premises. Clause 23 provided that "the trustees shall hold the proceeds to arise from any sale letting exchange or other dealing with the specifically mortgaged premises under the last preceding clause, which proceeds shall become and be part of the specifically mortgaged premises upon trust at the request of the company to apply the same if they shall think fit. . . . (2) in the purchase or acquiring of any freehold, leasehold or copyhold hereditaments or any rights of way or other easements or rights which may seem suitable for any of the purposes of the company and which shall be assured to and vested in the trustees," and until such application the trustees were to invest the same. By clause 26, "All property assured to or vested in the trustees in pursuance of the provisions herein contained shall be held by the trustees upon and subject to the trusts powers and provisions hereinbefore declared and contained and relating to the specifically mortgaged premises, and shall for all purposes be deemed to form part of the specifically mortgaged premises." In the second schedule to the deed was contained a list of the freehold and leasehold properties comprised in the specific charge. These properties were duly assured to the corporation as trustees of the deed. The deed being executed before the Companies Act, 1900, did not require registration under it.

A portion of the specifically mortgaged leaseholds was subsequently sold for the sum of 2,700*l.*, and the corporation, at the request of the company, agreed to apply this sum in the purchase of a leasehold public-house called the "Exile of Erin," but stipulated that they should not become liable in respect of the onerous covenants of the lease. By an indenture dated 14 March, 1902, and made between Margaret Carroll of the one part and the company of the other part, Margaret Carroll, in consideration of 2,700*l.*, demised to the company the public-house for the remainder of a term of 1,001½ years from 29 November, 1901, subject to a ground rent and onerous covenants.

By an indenture of 18 August, 1902, which was expressed to be supplemental to the trust deed, after reciting (*inter alia*) clause 28 (2) of the trust deed, that the corporation held certain moneys forming part of the specifically mortgaged premises, and that the "Exile of Erin" was suitable for the purposes of the company, and had not been vested in the trustees, and had not formed part of the specifically mortgaged premises, and that the corporation had agreed to pay to the company 2,700*l.* out of the trust funds held by the corporation upon having the public-house sub-demised to the corporation upon the trusts of the covering deed, it was witnessed that the company, in consideration of the 2,700*l.*, as beneficial owner demised to the corporation the "Exile of Erin," to hold the same for the residue of the term of 1,001½ years granted therein by the original lease (except the last day thereof), upon the trusts of the trust deed as if the same property had been originally comprised in and demised to the corporation by such deed.

The corporation proposed to register the sub-demise under section 14 of the Companies Act, 1900 (2), and the company thereupon brought this action.

(2) Companies Act, 1900, s. 14, sub-s. 1: "Every mortgage or charge created by a company after the commencement of this Act and being either—(a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the com-

pany; or (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company, shall, so far as any security on the company's property or undertaking

BYRNE, J., held that the sub-demise to the trustees required registration.

The company appealed.

Danckwerts, K.C., and *J. W. Manning*, for the appellants :

The 14th section of the Companies Act, 1900 (2), was considered in *In re Spiral Globe, Limited* (No. 2), *Watson v. Spiral Globe, Limited* [1902] (3), and *In re Harrogate Estates, Limited* [1903] (4).

The provisions contained in sub-section 4 of section 14 are alternative to those contained in sub-sections 1 to 3, and if the case is within sub-section 4, the earlier provisions do not apply. But what is intended to be registered under sub-sections 1 to 3? Only a mortgage or charge so far as any security is conferred thereby. No security was created by this sub-demise. The floating charge attached to the property when it was purchased.

Kenyon Parker for the respondents :

Sub-section 4 of section 14 (2) is not applicable here. Even if the whole of this transaction was one matter, "a mortgage or charge" was created for securing an issue of debentures, and that would require registration under section 14, sub-section 1. This was clearly a mortgage, and it was a security for the debentures.

[At the conclusion of the argument their Lordships reserved judgment, but stated that they desired that, before they gave judgment, the facts relating to the mortgage in question should be

is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the Registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured."

Sub-section 4: "Provided that where a series of debentures containing any charge to the benefit of which the

debenture-holders of that series are entitled *pari passu* is created by a company, it shall be sufficient to enter on the register—(a) the total amount secured by the whole series; and (b) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (c) a general description of the property charged; and (d) the names of the trustees, if any, for the debenture-holders."

(3) [1902] 2 Ch. 209; 71 L. J. Ch. 538; 86 L. T. 499.

(4) 10 Manson, 113; [1903] 1 Ch. 498; 72 L. J. Ch. 313; 88 L. T. 82; 50 W. R. 334.

stated with more particularity. A further affidavit was accordingly filed, the effect of which is stated in the judgments.]

VAUGHAN WILLIAMS, L.J., read the following judgment: I think that the appeal must be dismissed. I think that the company have created a mortgage or charge after the commencement of the Act for the purpose of securing an issue of debentures within the meaning of section 14, sub-section 1, of the Companies Act, 1900. I agree with Mr. Justice BYRNE that the result of the evidence is that property, which, prior to the execution of the deed in question, did not form part of the specifically mortgaged property as contained in the trust deed, thenceforward formed part of the specifically mortgaged property. This conclusion of Mr. Justice BYRNE's is confirmed by the affidavit of facts made in pursuance of the direction of the Court of Appeal. Paragraph 8 of that affidavit showing the grant of the lease on 14 March, 1902, and the payment of the duty as mentioned in paragraph 9, and the date of the under-lease as mentioned in paragraph 10, all go to confirm this view, which, I think, is the right view, although I think with Mr. Justice BYRNE that probably, if there had been a direct purchase from Margaret Carroll, the result might have been different.

STIRLING, L.J.: In this case I am unable to see my way to differ from the judgment of Mr. Justice BYRNE, who has held that the indenture of 18 August, 1902, was a mortgage or charge created by the company after the date fixed for the coming into operation of the Companies Act, 1900, and therefore requiring registration in accordance with the provisions of that Act. It appears from the affidavit which has been filed since the argument on the appeal that in November, 1901, the company requested the trustees of the covering deed to concur in a purchase, at the price of 2,700*l.*, of a leasehold public-house for a term of 1,001½ years from 29 November, 1901, subject to a ground-rent and onerous covenants, and that the trustees agreed to do so, but about the same time stipulated that the transaction should be so arranged that the property should be sub-demised to them in such a way that they should not be liable under the covenants in the lease. Thereupon

the company proceeded to carry out the proposed purchase as between themselves and Margaret Carroll, the lessor; and by a lease dated 14 March, 1902, she, in consideration of 2,700*l.*, paid to her by the company, demised the public-house to the company. This sum of 2,700*l.* was paid by the company out of their own funds. The result of this was that the leasehold became legally vested in the company, and constituted part of the assets of the company over which the trustees of the covering deed, by virtue of the provisions of that deed, acquired a floating, but not a specific charge. Matters so continued until 18 August, 1902, when the company delivered to the trustees of the covering deed the indenture of that date, and received in exchange from the trustees the sum of 2,700*l.*, part of a sum of money held by them on the trusts of the covering deed. In this way the trustees acquired for the first time a specific charge on the property in question—that is to say, a security of a different kind from that which previously existed. I think with Mr. Justice BYRNE that the transaction might have been carried out in such a way as to avoid an assurance to the trustees in the nature of a mortgage or charge requiring registration; but that, in the events which have actually taken place, the deed of 18 August, 1902, does create a mortgage or charge, and ought therefore to be registered. Sub-section 4 of section 14 of the Companies Act, 1900, was referred to on behalf of the appellants; but, inasmuch as the requirements of that clause have not been complied with, it does not seem to assist them. The appeal must be dismissed.

ROMER, L.J., concurred.

Solicitors: *Hays, Schmettau & Dunn*, for the Appellants.

Bircham & Co., for the Respondents.

IN RE SUSSEX BRICK CO.

1904, February 12. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

*Company—Registration of Transfer—Unreasonable Delay—Reconstruction—
Rectification—“Nunc pro tunc”—Companies Act, 1862, ss. 35 and 161.*

The power of the Court to rectify the register of members conferred by section 35 of the Companies Act, 1862, can be exercised after the liquidation of the company, and if not then reduced to merely settling the list of contributories.

Where, owing to unnecessary delay, a transfer of shares was not registered prior to the company going into voluntary liquidation for the purpose of reconstruction under the Companies Act, 1862, s. 161, the Court, in rectifying the register, directed the registration to take effect from the time when in the ordinary course of business the transfer ought to have been registered, the effect being to make valid a notice of dissent under section 161 given by transferees who at the time ought to have been, but were not, registered as members of the company.

In re Joint-Stock Discount Co., Nation's Case (1), approved and followed.

THIS was an appeal against part of an order of BUCKLEY, J.

On 16 January, 1901, W. Belcher transferred 5,000 fully-paid shares in the company to G. B. Browne and D. G. H. Pollock, and on 8 March, 1903, he transferred to them 17,234 similar shares. The transfer of the 17,234 shares was deposited with the company for registration prior to 20 March, 1903, and the earlier transfer of the 5,000 shares was deposited for registration prior to 4 April, 1903, and the two transfers ought, according to the view the Court took of the facts, to have been respectively registered on those dates in the ordinary course of business, and the fact that they were not so registered was due to unnecessary delay on the part of the company.

On 2 April, 1903, a special resolution was passed, which was confirmed on 20 April, for the voluntary winding-up of the company, the appointment of a liquidator, and the formation of a new company for the purposes (*inter alia*) of acquiring the properties, assets, and undertaking of the liquidating company, and that the liquidator be authorised, pursuant to section 161 of the Companies Act, 1862, to carry into effect an agreement for the

(1) L. R. 3 Eq. 77; 36 L. J. Ch. 112; 15 L. T. 308; 15 W. R. 143.

sale and transfer of the properties, assets, and undertaking of the liquidating company to such new company.

No notice of these meetings was sent by the company to Browne and Pollock; but on 25 April, 1903, Browne and Pollock gave notice of dissent from the special resolution to the liquidator, requiring the liquidator either to abstain from carrying the resolution into effect, or to purchase their interest pursuant to section 161, to which the liquidator replied that he could not accept their notice because they were not on the register of members.

The articles of the company provided that the instrument of transfer of any share in the company should be executed both by the transferor and transferee, and that the transferor should be deemed to remain a holder of such shares until the name of the transferee was entered in the register book in respect thereof.

On 19 May, 1903, Browne and Pollock, and also W. Belcher, took out an originating summons, intituled *In the matter of the Companies Acts, 1862 to 1890*, and in the matter of the company, asking for a declaration that the two transfers ought to have been respectively registered, and corresponding alterations in the register of members ought to have been made on 20 March and 4 April. The summons also asked for an order that the register of members might be rectified accordingly, as to the 17,234 shares as from 20 March, and as to the 5,000 shares as from 4 April, by removing the name of W. Belcher as the registered holder, and by entering thereon as the joint-holders of such shares the names of Browne and Pollock.

BUCKLEY, J., made an order that the register be rectified by registering the two transfers, but refused to ante-date the effect of the registrations as asked by the summons.

Browne and Pollock and W. Belcher now appealed from so much of the order of BUCKLEY, J., as refused to order the registration of the transfer of the 17,234 shares as and from 20 March, 1903, and of the transfer of the 5,000 shares as from 4 April, 1903, and asked that the order might be varied by providing that the rectification might have effect from those dates respectively.

The liquidator also gave notice of cross-appeal asking that the order of BUCKLEY, J., should be reversed.

The material provisions of the Companies Act, 1862, referred to in the arguments and judgments are set out in the footnote (2).

(2) Companies Act, 1862, s. 35: "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may as respects companies registered in England or Ireland by motion in any of her Majesty's superior Courts of law or equity, or by application to a Judge sitting in Chambers . . . apply for an order of the Court that the register may be rectified, and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. . . ."

Section 98: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities."

Section 131: "Whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the *status* of the members of the company, taking place after the

commencement of such winding up, shall be void, but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up."

Section 161: "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date

Muir Mackenzie, for the appellants :

The order for rectification ought to direct registration *nunc pro tunc* as in *In re Joint-Stock Discount Co., Nation's Case* [1866] (1). It is very material to the appellants in the present case, since under section 161 this notice of dissent from the special resolution can only be given by a "member of the company," and that within seven days after the passing of the special resolution.

[STIRLING, L.J. : It is quite clear that there is jurisdiction to give damages under section 35.]

The appellants prefer to insist on their rights under section 161—that is, to compel the liquidator to purchase their interests.

Gore-Browne, K.C., and *Harman*, for the liquidator :

The question is whether after a liquidation the rectification can be carried back except for the purpose of settling the list of contributories. *In re Joint-Stock Discount Co., Nation's Case* (1), shows that this can be done for that particular purpose ; but that case was decided under section 98, which links together the settling of the list of contributories and the rectification of the register under section 35 ; and for that purpose alone can the rectification be carried back. After the liquidation section 35 is inoperative except so far as it is kept alive by and for the purposes of section 98. Similarly, other sections which are applicable while the company is a going concern, cease to be effective on liquidation, as, for instance, section 32, which gives to a member of the company a right to inspect the books.

[COZENS-HARDY, L.J. : Section 131 seems to contemplate a transfer of shares after a voluntary liquidation, and not merely the settlement of a list of contributories.]

of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer ; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution. . . ."

Only with the consent of the liquidators. After a liquidation the sole question is as to a man's rights and liabilities as a contributory. A call is made according to the list of contributories, not according to the register of members.

[VAUGHAN WILLIAMS, L.J. : In Buckley on the Companies Acts (8th ed. 1902), pp. 322, 323, note to section 98, it is stated affirmatively that after a liquidation the power of rectification under section 35 is not limited to merely settling a list of contributories, and reference is made to *In re Scottish Universal Finance Bank, Breckenridge's Case* [1865] (3), *Reese River Silver Mining Co. v. Smith* [1869] (4), and *In re London, Hamburg, and Continental Exchange Bank, Ward and Henry's Case* [1866] (5).]

The effect of the passage is that after liquidation section 35 can only be invoked by virtue of section 98. The result of the appellants' contention will be that they were entitled to all the rights of members of the company—amongst others, to have received notice of the meetings for passing and confirming the special resolution. That would invalidate the whole resolution.

[VAUGHAN WILLIAMS, L.J. : I think not. The provisions of the Companies Acts were sufficiently complied with for that purpose by the issue of the notices to the members whose names then appeared on the register. The only question is whether the appellants, who expressed their dissent, are for the purpose of that dissent to be treated as having had their names on the register before or at the date of the meeting. I cannot conceive why not.]

No similar question was involved in *In re Joint-Stock Discount Co., Nation's Case* (1). Suppose in a case like the present that the transferor himself gave notice of dissent and the transferee did not. How could that question be settled except by reference to the strict rights arising out of actual membership at the time? The rights of all the members of the company will be affected by

(3) 2 H. & M. 642.

(4) L. R. 4 H. L. 64; 39 L. J. Ch. 849; 17 W. R. 1024.

(5) L. R. 2 Eq. 226; 35 L. J. Ch. 652; 14 L. T. 457; on appeal [1867] L. R. 2 Ch. 431; 36 L. J. Ch. 462; 16 L. T. 254; 15 W. R. 569.

this dissent, which is not unlikely to prevent the scheme from going through.

VAUGHAN WILLIAMS, L.J.: I think that this appeal must be allowed. I propose to deal with this case as one in which there has been an unfortunate accident which has resulted in very unnecessary delay in placing the names of Browne and Pollock upon the register.

In this case there can be no doubt that the names of these gentlemen ought to have been on the register at an earlier time, and, so far as this case is concerned, at a date earlier than the time of the holding of the meetings with regard to the reconstruction of this company. Under those circumstances there is no doubt that *In re Joint-Stock Discount Co., Nation's Case* (1), is an authority for the proposition that when it is right that an order for rectification should be made—and Lord ROMILLY in that case draws no distinction between an order for rectification by taking a name off or an order for rectification by putting a name on the register—the COURT may make an order not only that the right name shall be put on or taken off the register, as the case may be, but that the register shall be treated as if the name had been on or off the register at the time when it first ought to have been on or off the register.

The argument on behalf of the liquidator is this: "It is quite true that may be done in the exercise of the powers given by section 35 of the Act, but the power which was actually exercised by Lord ROMILLY was a power exercised in respect of a list of contributories, and after the commencement of this liquidation the only power under which the register can be modified is conferred by the 98th section, and the Court is no longer acting under the 35th section." It is said that after the liquidation the rectification is not under section 35, but under section 98, and that under these circumstances this rectification ought not to be made *nunc pro tunc*. On that point there is a decision of Vice-Chancellor WOOD in *Breckenridge's Case* (3), and it is clear that this particular point was raised there. According to the report of that case, counsel in argument said, "The 98th section of the Act of Parliament is a positive direction as to the course which is to be pursued. The Court has settled a list of contributories with power to rectify the

register for that purpose and is bound to rectify the register as far as may be necessary"; and the learned VICE-CHANCELLOR in giving judgment says: "It is said in opposition to the motion that it is irregular after a winding-up order has been made, because the whole matter is then in the hands of the Court, and I am referred to the 98th section of the Act to show that the rectification of the register is, after such an order, a matter merely auxiliary to the settlement of the list of contributories. But there is nothing in that section to prohibit the Court from acting in respect of the share register of the company in any manner in which it might have acted had that section not existed, and I cannot therefore hold that the hands of the Court are in any manner tied by that section." That decision of Vice-Chancellor Wood seems to me to be exactly in point, and to negative the argument which counsel for the liquidator has submitted to us; and I see that that view is taken in the last edition of Buckley on the Companies Acts, at p. 322, where several other authorities are cited in addition to *Breckenridge's Case* (3); and the learned author says in his note: "After a winding-up order has been made, the power of rectification given to the Court by section 35 is not cut down and reduced to a mere power of rectification in the settlement of the list of contributories. It is open to a contributory, after the order has been made and before the list of contributories has been settled, to move for rectification under this section and the 35th section." I have only to add this, that I do not mean for a moment to suggest that any one is entitled to such an order *ex debito justitiæ*; it is a matter in the discretion of the Judge, and there might be cases in which the Judge, although he considered it essential to a complete adjustment of the rights of the applicant himself, might still refuse to do so because he thought it would work injustice in respect of other people. If we thought here that it would work injury to other people, and especially if we thought it would work injury to persons who are not in any way bound to bear the mistakes of the company, it would be our duty carefully to consider the matter before making the order. But in the present case there is no suggestion of any such state of things at all. The suggestions that have been made are that if we make this order we shall invalidate the resolution because the meeting will not have been properly called, and a variety of other suggestions

of that kind which were dealt with in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to those two gentlemen, Browne and Pollock, without doing any injustice to any one else. Under these circumstances I think that the order for rectification ought to be carried back as asked in the notice of appeal.

STIRLING, L.J.: I am of the same opinion. The first objection raised in this case to the exercise of the jurisdiction which is conferred on the Court by section 35 of the Companies Act, 1862, is that it is said that the Court is deprived of the power of exercising that jurisdiction except for the purpose of settling the list of contributories. That objection is based on the wording of section 98. It is said that the power of rectification which is derived under section 35 is confined to the settlement of the list of contributories. I think that is entirely contrary to previous decisions. There is not only the case to which my Lord has referred—namely, *Breckenridge's Case* (3)—but I observe, in looking at another case which is cited in Mr. Justice Buckley's book—*Reese River Silver Mining Co. v. Smith* (4)—there is also the high authority of Lord CAIRNS for the proposition which was laid down by Sir WILLIAM PAGE-WOOD in the case which has already been cited. Lord CAIRNS says: "Notwithstanding the winding-up, the Court, under the 98th section, is to rectify the register of members in all cases where such rectification is required in pursuance of the Act, that is to say, at all events in those cases pointed out by the 35th section." Now the present case falls within the 35th section, because—as the learned Judge has found, and the finding of fact is really not disputed—in the language of section 35 of the Act, "unnecessary delay has taken place in the entering on the register the fact of a person having ceased to be a member of the company"; and he has also found that the names of the applicants Browne and Pollock have been omitted without sufficient cause from the register. That being so, the jurisdiction to make such an order as Mr. Justice BUCKLEY has made exists, and the order therefore must be sustained as far as it goes.

But the object of the appeal which was opened is to fix the date at which the change on the register is to be operative; and

it is contended on behalf of the liquidator that the Court, under section 35, has no power to do that. There, again, it seems to me we have the guidance of authority so old as the decision of Lord ROMILLY in *In re Joint-Stock Discount Co., Nation's Case* (1), which was decided in the year 1866. That order was made by the MASTER OF THE ROLLS, no doubt having regard to section 98, in the exercise of the powers conferred by section 35. It is therefore an authority that in a proper case the Court has power to fix a date at which the change in the register is to be made.

But after that there comes, no doubt, a serious question. The application of the appellants is in substance that the registration be made *nunc pro tunc*. Now, when an application of that sort is made the Court ought to be very careful to see that it does no injustice by making the registration really retrospective. I may point out that the power which is conferred by section 35 is not imperative. All that it provides is that the Court may in a proper case make an order for rectification. Therefore the Court has full discretion to deal with every particular case which comes before it in such a way as may produce complete justice; but in the present case I fail to see that any injustice will be done if the alteration is made as is asked. What took place was that these gentlemen, the present appellants, pressing to have their transfer registered and seeking their certificates as early as possible, get answers from the secretary of the company which led them to believe that by the date of the last meeting the register would be altered, and they would appear as members. Supposing that this had been done, although they had not received their certificates, they sent in notices of dissent from the special resolution in the way prescribed by section 161 of the Act. That gave the liquidator full notice of the position that they took in the matter, and he chose to disregard it. Then this application is made to Mr. Justice BUCKLEY, with the result that the register is altered in favour of the appellants. There is no evidence before us to satisfy me in any way that any injustice is likely to accrue from the alteration of the register being dated so as to cover the notice which was given by the present appellants in the exercise of the rights which they had as members under section 161. I think, therefore, that the order ought to be made.

COZENS-HARDY, L.J.: I am entirely of the same opinion. It seems to me that counsel's argument against the appeal is really based on this hypothesis—that the register of members is a thing which ceases to have any real operation or existence after the winding-up order, and that the only right which can be dealt with after a winding-up order is to be given effect to by making some change in the list of contributories. Well, if one comes to look at the scheme and method of the Act, the register of members is one thing and the list of contributories is an entirely different thing. The list of contributories—to mention one distinction which is known as list “A” and list “B”—is something larger and different from the register of members; and the Act itself, as it seems to me, indicates in no doubtful manner that, notwithstanding a winding-up, the register of members and the *status* of members may be altered. Now section 131, under which Mr. Justice BUCKLEY has acted or under which he has partly acted, asserts that there may be, after a winding-up, transfers of shares with the sanction of the liquidators. That being so, it seems to me that, quite apart from any list of contributories, there is a register of members to which all the provisions of section 35 of the Act ought to be applied. The authority to which my Lord has called attention, and also the authority to which Lord Justice STIRLING has called attention, seem to me conclusively to show that the power given by section 35 is independent of that which is found by reference under section 98. I, therefore, cannot doubt that the Court now has the right to exercise every power which is conferred by section 35 when we find there has been an undue delay in registering a transfer. That there has been undue delay here is found as a fact by the learned Judge, and the accuracy of that finding is really not disputed. Then we have authority going back to the very early days of the Companies Act, 1862, that an order under section 35 may be made having a retrospective effect—“may” I say, not “must,” be made—may be made in a proper case; and may be made imposing such conditions as the Court thinks necessary to protect the rights of any third persons; but in a case like this, where there has been no real serious suggestion of any ill result or any unjust consequence which would follow from dating the transfers as at the date when they ought to have

been registered, I can see no ground for imposing any condition. I think, therefore, the order proposed by my Lord is quite right.

Muir Mackenzie :

It will be sufficient for the appellants if the registration of each transfer is carried back to 4 April, 1903.

VAUGHAN WILLIAMS, L.J. : Then let that be the date.

Harman :

The notice of the confirmatory meeting of 20 April will not be invalidated thereby?

VAUGHAN WILLIAMS, L.J. : It will not affect that notice at all. The notice was in accordance with the register as it then stood.

Appeal allowed.

Solicitors : *Ingle Holmes, Son & Pott*, for the Appellants.

Morris, Fuller & Co., for the Respondent.

IN RE SAFETY EXPLOSIVES, LIMITED.

1903, December 19. C. A. VAUGHAN WILLIAMS AND STIRLING, L.JJ.

Company—Winding-up—Solicitor—Claim for Costs—Lien on Documents—Proof of Debt—Omission to mention Lien—Amendment of Proof—"Inadvertence"—Companies (Winding-up) Act, 1890, Schedule I., clause 8.

Where a solicitor, who is a creditor for costs against a company in liquidation, claims a lien on documents of the company in his possession, but omits to mention the lien in his proof of the debt due to him, and subsequently acts as an unsecured creditor, he will not be allowed as a matter of right under the Companies Act, 1890, Schedule I., clause 8, to withdraw or amend his proof so as to claim his lien. Leave to amend will not be given unless the Court is satisfied that the omission was due to inadvertence on his part, and that the position of the liquidator has not been altered since the proof was carried in in a manner which is inconsistent with the lien claimed.

THIS was an appeal from decision of BUCKLEY, J., on an application by Messrs. Cox and Lafone, solicitors, under clause 8 of the first schedule to the Companies (Winding-up) Act, 1890 (1), for leave to

<p>(1) Companies (Winding-up) Act, 1890, Schedule I., clause 8 : " For the purpose of voting, a secured creditor</p>	<p>shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given,</p>
--	--

amend the proof of their debt in the winding-up of the above-named company by inserting therein the particulars of a security on the property of the company which the applicants held at the date of the commencement of the winding-up and the date of the proof, which security consisted of the lien of the applicants, as solicitors of the company, upon the title-deeds of the freehold and leasehold properties of the company, and certain of the letters patent of, and documents conferring patent rights on, the company, or in the alternative for leave to the applicants unconditionally to withdraw their proof and rely on the security for payment of the debt due to them by the company.

At the date of the winding-up order, which was made on 5 August, 1902, a large sum was due to Cox and Lafone from the company for costs.

The form of proof was prepared by one Moore, a clerk to the applicants, who was unaware that the title-deeds and documents were in their possession. The proof was sworn by Gordon Cox, a member of the firm, on 5 September, 1902, and at the time it escaped his notice that it stated that the firm held no security for the debt due to them. He deposed that neither he nor his partner had the slightest intention of abandoning their lien. It was at first thought that the assets of the company would be sufficient to pay their debts in full. The properties of the company were sold by tender in December, 1902, for 8,600*l.*, and the purchase was completed on 4 February, 1903. The documents of title were handed over to the purchaser, and the balance of the purchase-money received by Cox and Lafone, as solicitors for the vendor. They retained 824*l.* 12*s.* 9*d.* in respect of their lien, of the existence of which the liquidator was then aware, and forwarded the balance to the liquidator.

The sum retained was made up of 809*l.* 12*s.* 5*d.* for costs for work done for the company before the winding-up, and 15*l.* 0*s.* 4*d.* for costs of the winding-up petition.

The liquidator drew attention to the fact that the applicants had and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

on the hearing of the petition and subsequently acted as unsecured creditors, and also had not raised any suggestion of their lien on the sale of the company's property, and had transferred or handed over the documents to the purchaser. He submitted that the whole course of the realisation had been influenced by the applicants' omission to claim security, and that matters could not now be altered and put back to their former position.

BUCKLEY, J., held that the inadvertence was proved, and he gave liberty to amend or withdraw as asked by the summons.

The liquidator appealed.

H. Reed, K.C., and E. O. Simpson, for the appellant :

The order of BUCKLEY, J., was erroneous. The solicitors having parted with the documents have lost their lien. Negligence as to retaining the documents is not "inadvertence": *In re Henry Lister & Co., Ex parte Huddersfield Banking Co.* [1892] (2). Leave will not be granted to amend a proof where, by something which has happened since, the position of the parties concerned has been altered: *In re Newton, Ex parte National Provincial Bank of England* [1896] (3).

Gore-Browne, K.C., and Muir Mackenzie, for the respondents :

If the security is a good one, the solicitors should be allowed to set it up, and the amendment should be allowed: *In re Burr, Ex parte Clarke* [1892] (4), and *In re Piers* [1898] (5).

[VAUGHAN WILLIAMS, L.J., referred to *In re Hawkes, Ackerman v. Lockhart* [1898] (6).]

If the Court is satisfied that there was an omission to value the security through inadvertence, then there has in fact been no surrender of the security, and the solicitors should be allowed

(2) [1892] 2 Ch. 417; 61 L. J. Ch. 721; 67 L. T. 180; 40 W. R. 589.

(3) 3 *Manson*, 200; [1896] 2 Q. B. 403; 65 L. J. Q. B. 686; 75 L. T. 144; 45 W. R. 63.

(4) 67 L. T. 232, 465; 40 W. R. 608.

(5) 5 *Manson*, 97; [1898] 1 Q. B. 627; 67 L. J. Q. B. 519; 78 L. T. 314; 46 W. R. 475.

(6) [1898] 2 Ch. 1; 67 L. J. Q. B. 284; 78 L. T. 336; 46 W. R. 445.

to avail themselves of it. The amendment would not involve acceptance or rejection of the lien; it would only allow it to be set up.

It is not sufficient to take away the right of amendment that it should merely be shown that the liquidator has acted in a manner not consistent with the proof. It must be shown that he has so acted, because the proof was placed on the file and in reliance on it.

VAUGHAN WILLIAMS, L.J.: In my judgment, this appeal ought to be allowed, and I do not think that an order ought to be made allowing these gentlemen to amend or withdraw their proof. Of course I must not be understood to say that these gentlemen cannot withdraw their proof merely for the purpose of correcting an inaccurate statement made in it. With that object I do not suppose the liquidator would have any objection to the withdrawal at all. But my judgment is that they ought not now to be allowed to withdraw their proof for the purpose of relying on their lien. It is admitted that they want to amend their proof for the very purpose of justifying their claim to this 800*l.* by virtue of their lien, and it is also an admitted part of the case that there was not any express bargain made between the liquidator and his solicitors as to their lien. Now, what have we to do in a case like this? We have first to apply rule 8 in the First Schedule to the Companies (Winding-up) Act, 1890. I do not want in the slightest degree to depart from what I said in *In re Burr* (4), as to what constitutes inadvertence. I mentioned there, amongst things which could not constitute inadvertence, a case where the creditor, feeling the dangers and disadvantages of valuing his security, elects not to mention it. That is not this case; but, speaking for myself, I have been left by the affidavit of Cox in a most uncertain frame of mind as to what were the circumstances under which Cox failed to mention his security and put it in his proof. It seems that his clerk placed before him the proof to swear and a general form of proxy, and that he swore the proof and signed the proxy. I can only say that it is quite consistent with Cox's statement that he was quite unaware that the proof purported to state that his firm had no security for the debt; that Cox remembered at that moment the fact that his firm had security. Now, if he remembered that his

firm had security, he might have well been quite unaware of the statement in the proof that he had none, and yet be of opinion that it was not worth while to bother about the security as the estate was likely to yield twenty shillings in the pound, and if necessary it would return enough to meet the proof, and the security. As I say, there is nothing in the affidavit which excludes that state of mind on the part of Cox. Now, if that was his state of mind, it would not be true to say that, within the meaning of the word "inadvertence" in the sense that I have mentioned, he did intend to omit the security from the proof. Mr. Justice BUCKLEY has arrived at the conclusion that he inadvertently omitted to state the security, and, of course, to value it; but Mr. Justice BUCKLEY's attention does not seem to have been called to the fact that the particular paragraph in Cox's affidavit is open to the comment that I have made upon it. On the other hand, it should be said that the later affidavit of Cox, although he does not mention the state of the assets as the reason for omitting to value his security, does show conclusively that this frame of mind continued down to the time of his swearing that proof—that is to say, that he continued to take the view that twenty shillings in the pound was going to be obtained. I myself do not think that Cox by that affidavit satisfies the *onus* that was clearly on him of showing what the omission was caused by, and that it was due to inadvertence.

I will go on and deal with the case upon the assumption that that is the proper view to take of Cox's affidavit, which I do not quite think it is. But if it is, what is the state of things? We have a solicitor who has a debt. He is relying upon a lien which has arisen during the time he has been retained, not by the company, but by the liquidator. In the course of this liquidation it becomes necessary to realise the assets. Cox, as solicitor, is acting for the liquidator in the matter of this realisation of the assets. He puts in a proof which is a proof which negatives his having any lien in the matter, but he allows his client to invite tenders for the sale of the assets, including, amongst others, some portions of the property as to which his firm held the deed—and allows his client to do that, without in the slightest degree warning him that when he came to realise that part of the property as to which his firm held the deeds, there would be a difficulty in carrying out the

entirety of the contract unless twenty shillings in the pound was paid in respect of the bill of costs. He allows that to be done; and one can only say that such conduct by the solicitor was perfectly consistent with the proof that he had put in on behalf of his firm—a proof which was, of course, within the knowledge of the liquidator. After these tenders had been sent out on 4 January, a letter was written by the liquidator to Cox and Lafone, and in the answer to it on 5 January there is an allegation of their lien, although it is limited to the policy of insurance, which formed part of the company's property, but the document does not in any way refer either to the proof or to the lien as if it would in any way interfere with the carrying out of the contract. It is suggested that it is impossible that the liquidator should in that state of things, and after the receipt of that letter, have acted upon the assumption that the proof as put in was in accordance with the facts and in accordance with the position taken up by Cox and Lafone. I do not agree as to that. I can well conceive the liquidator receiving that letter without in the slightest degree realising that there was such a lien set up by these gentlemen as would interfere with the carrying out of the contract between the parties. It seems to me that the solicitors here were actuated all the way through by the confident feeling that twenty shillings in the pound would be paid, and under those circumstances they did not call the attention of the liquidator to the fact that they were insisting upon this lien, which would stand in the way of the realisation.

Now the sale took place and the deeds were handed over by the solicitors to the purchasers. The obvious duty of the solicitors, if they meant to rely upon the lien, was, before they handed over the deeds, to call the attention of the liquidator to it and ask him whether there was any objection (notwithstanding their being handed over) to their claim; but nothing of that sort took place. In that state of things the sale went through, and they were handed to the purchaser. The solicitors now come to us saying, "Give us leave to amend our proof." I think that leave ought not to be given. I think it ought not to be given, because the solicitors' object in amending the proof is to set up a state of things which is inconsistent with their own proof that was on the

file at the time of the carrying through of this purchase and is inconsistent also with their own action at the time of the sale.

Counsel for the respondents did not deny the proposition that you ought not to allow the amendment of a proof if the position of the parties has been altered after that proof has been put upon the file, and while it is continued there, if the liquidator has altered his position on the basis of that proof being there. But they draw this distinction, saying, "It is not sufficient to show that the liquidator has acted in a manner which is not consistent with the claim made, but you must show that he so acted because the proof was on the file." I do not agree with that. It seems to me, if one man allows a state of things to continue and another acts in a way which can be supported if that state of things existed, but could not be supported unless that state of things did exist, that you ought not to allow an alteration which will prejudice or alter a state of things which existed at the time when he was so acting. It seems to me it would be wrong to throw upon the liquidator the obligation to show that he relied upon the proof. Whether the proof was actually present in his mind or not, he was dealing with the property upon the basis that there was no lien at all upon it. I think the whole conduct of the solicitors, apart from the letter of 5 January, was such as to induce him to suppose that there was no lien which a solicitor could enforce which could stand in the way of this sale and purchase, and I think that under those circumstances we ought not to allow the solicitor now to amend his proof. Therefore, in my opinion, this appeal should be allowed—first, on the ground that Cox has not satisfied the *onus* which was upon him of showing that his proof was sworn by inadvertence. I have no doubt it was sworn by inadvertence so far as Cox was aware of it, but I am not satisfied myself that Cox had not present to his mind that his firm had that security. Secondly, I am of opinion that he ought not to be allowed to amend in a case where the liquidator has acted in a way which was consistent with the facts mentioned in the proof, but which would be inconsistent with the suggestion which is now sought to be made. I think under the circumstances leave to amend ought not to be given.

STIRLING, L.J.: I am of the same opinion. The first point that

has to be considered is whether the Court is satisfied that the omission to value the security claimed by the creditor took place by "inadvertence." Now, for the reasons which have been given by my learned brother, the evidence appears to me, as it does to him, to be very unsatisfactory, but I am not prepared to say that inadvertence has not been made out.

Though I agree with my Lord's criticisms of the affidavit, I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the Court, and ought not to be given in a case where in the interval between the proof being carried in and the evidence as to the varying of it the position of all parties, and of the liquidator in particular, has been altered. What took place here was this: The creditors in the present case are solicitors, who had been solicitors to the company which is being wound up, and they had due to them costs to the amount of over 800*l.* in respect of services which were provable in the winding-up. They had in their office certain deeds and documents belonging to the company, and the liquidator appointed in the winding-up appointed them also as his solicitors, and amongst other things in which they were called to advise upon by the liquidator was the sale of the property of the company. The property consisted of various elements. First of all there was a patent; secondly, came freeholds and leaseholds, on which were plant and machinery, I understand, fixed and movable; and lastly, there was stock-in-trade.

That being the state of things, the solicitors had a lien on the documents which belonged to the company for the debt due to them by the company. I cannot help thinking there has been some misapprehension between the parties as to the nature of the solicitors' right. A solicitor's lien simply entitles him to retain the documents in his hands until he receives payment of what is due to him as solicitor. The solicitors here advised the liquidator with reference to this sale, and it seems to me that it was their duty plainly to tell the liquidator what rights they had in respect of these documents. They ought to have told him, "You have to sell this property, but you must remember we cannot complete this sale without our fees, and we shall not part with the deeds unless and until we are paid all that is due to us from the company." Then the liquidator

would have been in a position to consider what he should do, and it might be a most important thing to consider how he should sell the property. The patent, for example, which I understand was in the possession of the solicitors, would undoubtedly affect the title to the assets of the company. The title of the leaseholder would be again affected by the lease. As regards the fixed plant and the machinery and stock-in trade, that would be entirely unaffected. Now the question of a solicitor's lien has arisen not only in selling estates, but in winding up companies, and what I should expect to be done is this: that either an arrangement should be made as between the solicitors and liquidator, or, if the parties were unable to come to an arrangement between themselves, that the matter should be brought before the Court in some shape or form. In some cases it might be best that the sale should go on practically unaffected without the title-deeds being produced at all or these documents being affected. The liquidator might get an order simply to put them up for sale, with conditions such as would dispense with his handing over to the purchaser the deeds to which the purchaser would otherwise be entitled. That is all. It sometimes happens that a sale is allowed to go on the arrangement that the solicitor retains a certain amount of the purchase-money set aside to meet his claim, but that is by arrangement between the parties themselves or under the direction of the Court. No arrangement of any kind is admitted to have been made here. The sale was ready to take place of the whole of the property, both where the title-deeds were withheld and where they were not. The sale took place, and was completed, and the solicitors handed over to the purchaser the deeds of one lot, and, having done that, seek to retain the amount of their lien. Now they come to the Court and ask it to assist them in making good their claim, and that they may be allowed to withdraw and amend their proof. I think under the circumstances they should not be allowed to do so.

Appeal allowed.

Solicitors: *Helder, Roberts & Co.*, agents for *W. H. Clarke*,
Leeds, for the Appellants.

Cox & Lafone, for the Respondents.

IN RE GREYMOUTH-POINT ELIZABETH RAILWAY
AND COAL CO., YUILL v. GREYMOUTH-POINT
ELIZABETH RAILWAY AND COAL CO.

1903, November 5. FARWELL, J.

Company—Directors—Disability to Vote—Formation of Quorum.

A director of a company is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote.

ADJOURNED SUMMONS.

The Greymouth-Point Elizabeth Railway and Coal Co., Limited, was incorporated on 4 March, 1893, under the Companies Acts, 1862 to 1890.

Article 104 of the articles of association provided as follows: "Subject to the provisions of articles 105 and 106, any director may enter into a contract with the company . . . and he shall thereby neither vacate his seat, nor become disqualified to act as director. . . ."

Article 105 was not material to the question now in issue.

Article 106 was as follows: "No director shall vote on any matters relating to the contract . . . with . . . which he shall be connected . . . ; and, if he does so vote, his vote shall not be counted."

Article 116 was as follows: "The directors may . . . determine the quorum necessary for the transaction of business; until otherwise determined, two directors shall be a quorum."

The company were entitled by their memorandum of association to raise money by the issue of debentures. In exercise of this power they duly created, in 1894, a series of first mortgage debentures to the extent of 90,000*l.*, secured by a debenture trust-deed. Prior to 10 December, 1897, they had issued debentures of this series to the total amount of 88,800*l.*, thus leaving a balance of 1,200*l.* unissued at the date in question.

During the year 1897 the company was in financial difficulties, and prior to 10 December, 1897, they had borrowed two sums, of 1,294*l.* and 730*l.*, from two of their directors, Joseph Macdonald and John McDonald respectively.

On or about 10 December, 1897, the company, being still in

difficulties, requested these same two directors to make them two further advances of 76*l.* 5*s.* each. This the two directors consented to do, on the understanding that the company, in consideration of these new advances, and in consideration of the old advances previously made, should issue to them the 1,200*l.* debentures already referred to as still unissued.

A resolution was accordingly passed by the board of directors on 10 December, 1897, for the issue to these two directors of the 1,200 debentures. The only directors present at the passing of this resolution were the two directors interested and a third director, MacDougal. The 1,200*l.* debentures had, in fact, never been issued to the two directors.

On 10 October, 1900, the writ was issued in the present debenture-holders' action. On 25 March, 1902, the present summons was taken out in the action by John McDonald and by the executors of Joseph Macdonald (who had previously died) for a declaration that they were entitled to rank to the amount of 1,200*l.* with the other holders of the 90,000*l.* series of first mortgage debentures, and to participate *pari passu* with them in any distribution of the assets of the company available for the payment of such debentures, on the same footing as if the 1,200*l.* debentures had been actually issued to the applicants on 10 December, 1897.

There was evidence that all the parties to the matter had acted in good faith.

Mark Romer, for the summons :

The resolution of 10 December, 1897, constituted a valid contract for the issue of these debentures. It is true that the two directors interested were disentitled from voting in the matter of article 106, but there is nothing in that article to prevent them from taking part in forming the necessary quorum.

Leigh Clare, for the opposing debenture-holders :

The resolution was invalid. It is absurd to suggest that a man can help to form a quorum for the decision of a question on which he cannot vote. The resolution of 10 December, 1897, was really passed by MacDougal sitting alone ; and, since two directors were necessary to form a quorum, the resolution so passed was invalid.

Jenkins, K.C., and P. F. S. Stokes, for the company.

W. E. Vernon, for the trustees of the debenture trust-deed.

FARWELL, J.: It is curious that there should be no authority on the point raised by this summons; and, as the articles in question are common form, the point is of some importance. I think that the argument of counsel for the opposing debenture-holders is well founded, and that the true meaning of clause 116 of the articles is that the two directors necessary to form a quorum for the dispatch of business must be two directors capable of voting on the business to be dispatched. Otherwise, that article is idle. In the present case, there were three directors present, and I take it that they voted for giving debenture security to two of themselves in consideration of a large sum of money then owing to those two, and a smaller sum then advanced or to be advanced by them. The giving of this security was a matter on which two of the directors could not vote by reason of article 106; and, moreover, if there had otherwise been a quorum, I think the other directors would have been justified in asking them to retire while the question of giving them security was being discussed, because they were interested adversely to the company. Certainly it was a case in which the company was entitled to all the benefit it could get from its independent directors. On the construction of the articles I think that the contention of counsel for the opposing debenture-holders is right, and that the two directors were not capable of voting on the question; and that, therefore, there was no quorum, and no valid contract for the issue of debentures to the plaintiffs. That disposes of the question.

Solicitors: *Roy & Cartwright, for the Summons.*

*Parker, Garrett, Holman & Howden, for the Opposing
Debenture-holders.*

Blyth, Dutton, Hartley & Blyth, for the Company.

*Kimbers & Boatman, for the Trustees of Debenture
Trust-deed.*

BRITISH ASBESTOS CO. v. BOYD.

1903, May 27. FARWELL, J.

Company—Director—Vacation of Office—Acts done as Director thereafter—Validation—Articles of Association—Construction—Companies Act, 1862, s. 67.

One of the articles of association of a company incorporated under the provisions of the Companies Acts, 1862 to 1893, provided: "All acts done at any meeting of the directors or of a committee of such directors or by any person acting as such directors, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or committee, or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director":—

Held, that the provisions of this article and of section 67 of the Companies Act, 1862, validated the acts of a person *bonâ fide* acting as director who had been originally appointed a director but had vacated his office, according to the constitution of the company, on his appointment as secretary thereof, where the fact had been overlooked.

Dawson v. African Consolidated Land and Trading Co. (1) followed.

THE plaintiff company was incorporated under the provisions of the Companies Acts, 1862 to 1893, on 21 January, 1899. W. Menzies, James Boyd, and James Reid were appointed the first directors of the company by the articles of association. The articles of association also contained the following material provisions: Article 89. "The office of director shall be vacated (a) if he without the sanction of any general meeting accept or hold any other office under the company except that of managing director, manager, or trustee; . . . (d) if he cease to hold the required amount of shares to qualify him for office, or do not acquire the same within one month after election or appointment; (e) if he absent himself from the meeting of the directors during a period of six calendar months without special leave of absence from the directors; . . . (f) if by notice in writing to the company he resign his office." Article 98. "The directors of the company may, from time to time, appoint one or more of their body to be managing director or directors of the company." Article 108. "All acts done at any meeting of the directors or of a committee of such directors, or by any person acting as such director, shall,

(1) 4 Manson, 372; [1898] 1 Ch. 6; 67 L. J. Ch. 47; 77 L. T. 392; 46 W. R. 132.

notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or committee, or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director."

On 19 September, 1899, the plaintiffs Brauns and Perotti, who were vendors to the company of a business in Italy, were elected additional directors of the company. Subsequently to 3 July, 1902, Brauns and Perotti never attended a meeting of the directors, being continuously resident in Italy after that date.

On 23 October, 1902, James Boyd, one of the original directors, was appointed secretary to the company. The sanction of a general meeting, as required by article 89, was not obtained to this appointment, but the fact that he had thereby forfeited his office of director was overlooked at that time and during the subsequent period of his acting as director. On 4 December, 1902, Menzies duly resigned his office of director. On the same day Boyd and Reid, being a quorum according to the constitution of the company, purported to appoint Boyd's son to be secretary in place of his father, and to elect James Boyd (the father) to be chairman and managing director of the company. On 5 January, 1903, Boyd (the father) and Reid held another meeting of directors, at which attention was called to the terms of article 89 (e), and Perotti was given special leave of absence from the meetings of the directors. Reid and Boyd then purported to elect the defendant Methven to be a director of the company. At a meeting of the board on 18 February, 1903, at which Methven, Reid, and Boyd were present, attention was drawn to the fact that Brauns had been absent for more than six months without leave, and it was decided to inform him that he had thereby ceased to be a director, and a notification to that effect was sent to him.

On 3 March, 1903, a general meeting was summoned for 23 March, 1903, and a report was issued, signed by Boyd and Reid.

On 16 March, 1903, five shareholders (amongst whom were Brauns and Perotti) issued a circular summoning an extraordinary general meeting of the company for 31 March, following. They purported to do so under section 52 of the Companies Act, 1862, upon the ground that there was no board of directors competent to

summon a general meeting. They alleged that the notice of 3 March was inoperative and invalid.

On 17 March, 1903, Boyd, Reid, and Methven held a board meeting, and it was resolved that, in consequence of the position of Boyd as a duly constituted director of the company having been challenged by the issue of the above-mentioned circular, Boyd should be, and was thereby, reappointed a director of the company.

The meeting summoned by the notice of 3 March, for 25 March was duly held, and the defendant Brooks was then appointed a director. The extraordinary meeting summoned for 31 March by five shareholders was also held, and four directors were appointed to act in conjunction with Reid.

On 27 March, 1903, Brauns and Perotti (on behalf of themselves and all other the shareholders in the company other than the defendants) issued a writ, joining the company as a co-plaintiff, asking for a declaration that Boyd, Methven, and Brooks were not directors of the plaintiff company. They also asked for an injunction to restrain these three persons from acting or purporting to act as directors, and from paying the dividend purported to have been voted at the meeting of 25 March, 1903. Notice of motion was given the same day asking for an interim injunction in similar terms.

Upjohn, K.C., and *Martelli* for the plaintiffs :

Boyd vacated office by force of article 89 (a). The appointment of directors in purported exercise of the powers conferred by section 52 of the Companies Act, 1862, was valid.

Gore-Brown, K.C., and *H. E. Wright* for the defendants :

The alleged informality due to the appointment of Boyd as secretary is not disputed, but it is an irregularity cured by the terms of article 108, and section 67 of the Companies Act, 1862 (2) : *Dawson v. African Consolidated Land and Trading Co.* [1898] (1).

(2) Section 67 of the Companies Act, 1862, so far as material to be stated, is in the following terms: . . . "until the contrary is proved . . . all appointments of directors, managers, or liquidators, shall be deemed to be

valid, and all acts done by such directors, managers, or liquidators shall be valid notwithstanding any defect that may afterwards be discovered in their appointments or qualifications."

They also referred to *In re Bank of Syria, Owen and Ashworth's Claim* [1900] (3).

Upjohn, K.C., replied.

FARWELL, J. : The first question that I have to determine in this case is the meaning to be attached to article 108 and section 67 of the Companies Act, 1862; and, inasmuch as the article is in common form in its language, the question is one of some importance. In my opinion the words in article 108, "notwithstanding that it shall afterwards be discovered that there was some defect," do not limit the validating power of the article to instances where the facts giving rise to a defect are subsequently discovered. It is only necessary that the defect arising out of the facts should be subsequently discovered. The facts in a case like the present would necessarily appear upon an inspection of the books of the company; but they did so, too, in the case of *Dawson v. African Consolidated Land and Trading Co.* (1), for the transfers there which caused the disqualification of a director were transfers out of his name. Those transfers were recorded in the company's books, and would be apparent to any one who inspected the company's books. It is not therefore necessary that the facts should not be known in the sense of not appearing on the face of the company's books, but the knowledge of the defect must not be present to the mind of any person to whom it is material to know it. As stated in *Buckley on the Companies Acts*, the object of a clause like this and of section 67 of the Companies Act, 1862, is to make the honest acts of *de facto* directors as good as the honest acts of *de jure* directors; and although down to the decision in *Dawson v. African Consolidated Land and Trading Co.* (1) it was generally supposed that an article in these terms, or the section, only applied as between members of the company and outsiders, and did not apply as between members of the company *inter se*, or as between members of the company and the company, that decision has established that the article or section is of general operation. I think it is decidedly

(3) 8 Manson, 105; [1901] 1 Ch. 115; 70 L. J. Ch. 82; 83 L. T. 547; 49 W. R. 100.

beneficial that it should be so. Therefore, although there may be some slip which has been overlooked, if it has been *bond fide* overlooked, the acts of *de facto* directors are as good as the acts of *de jure* directors.

Then the next point is this. It is said that the discovery referred to must be of some defect in the appointment of directors. It is clear that there is no defect in the appointment here. Now, the disqualification in the present case is under article 89 (a), which is as follows: "If he, without the sanction of any general meeting, accept or hold any other office under the company except that of managing director, manager, or trustee." Boyd, senior, accepted the office of secretary, and thereby vacated his office. It has been argued that the word "disqualify" has a technical meaning, and that the disqualification referred to is the ceasing to hold qualification shares. To my mind that is not the case. I think "disqualify" refers back to article 89, and is used in the general colloquial sense, that a director becomes disqualified if he ceases to hold his office, or does some act, or suffers something to happen, which causes him to vacate his office under article 89. I think "disqualified" is used in the wider sense, and that therefore the article applies.

The result is that on 5 January, which was the critical date, there was a *de facto* board of directors in respect of whose appointment no defect had been discovered. Consequently I hold that the defendants are properly constituted directors. The motion therefore fails.

Solicitors: *William A. Crump and Son*, for the Plaintiffs.

E. W. Oliver, for the defendants.

IN RE EUPHRATES AND TIGRIS STEAM
NAVIGATION CO.

1904, January 19. SWINFEN EADY, J.

Company—Memorandum, Alteration of—Jurisdiction—Company Registered under Joint-Stock Companies Act, 1856—Companies Act, 1862, s. 176—Companies (Memorandum of Association) Act, 1890, s. 3, sub-s. 2.

The Court has jurisdiction to make an order under the Companies (Memorandum of Association) Act, 1890, in the case of a company registered under the Joint-Stock Companies Act, 1856, although it is not also registered under the Companies Act, 1862.

In re Nitrophosphate and Odams Chemical Manure Co. (1), In re Hong-Kong and China Gas Co. (2), and In re Copiapo Mining Co. (3), followed.

In re General Credit Co. (4) not followed.

THE company was registered under the provisions of the Joint-Stock Companies Act, 1856, but had not been also registered under the Companies Act, 1862. The company presented a petition under the provisions of the Companies (Memorandum of Association) Act, 1890, for an order sanctioning certain alterations in its memorandum of association.

Eve, K.C., and R. J. Parker, for the company :

There are conflicting decisions on the preliminary point whether a company registered under the Joint-Stock Companies Act, 1856, should also be registered under the Companies Act, 1862, before an order can be made under the Companies (Memorandum of Association) Act, 1890. ROMER, J., in *In re General Credit Co.* [1891] (4), held that further registration was necessary, but the contrary view is maintained by KEENEWICH, J., in *In re Nitrophosphate and Odams Chemical Manure Co.* [1898] (1) and *In re Hong-Kong and China Gas Co.* [1898] (2), and by WRIGHT, J., in *In re Copiapo Mining Co.* [1899] (3). The weight of authority is against requiring further registration under the Companies Act, 1862.

(1) W. N. (1893) p. 141.

(2) W. N. (1898) p. 158; 33 L. J. N. C. 578.

(3) 6 Manson, 320; W. N. (1899) p. 25; 34 L. J. N. C. 138.

(4) W. N. (1891) p. 153.

SWINFEN EADY, J. : I think I may accede to the argument. By section 3, sub-section 2 of the Companies (Memorandum of Association) Act, 1890, it is provided, "This Act and the Companies Acts, 1862 to 1886, shall be construed as one Act." Then section 176 of the Companies Act, 1862, provides, "Subject as hereinafter mentioned, this Act, with the exception of Table A in the first schedule, shall apply to companies formed and registered under the said Joint-Stock Companies Acts"—which expression is, by the preceding section, defined to include the Joint-Stock Companies Act, 1856, under the provisions of which this company is registered—"or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares." I think I am justified in following the decisions of Mr. Justice KEKEWICH in *In re Nitrophosphate and Odams Chemical Manure Co.* (1) and *In re Hong-Kong and China Gas Co.* (2), and of Mr. Justice WRIGHT in *In re Copiapo Mining Co.* (3), and in holding that a company registered under the Joint-Stock Companies Act, 1856, may present a petition under the provisions of the Companies (Memorandum of Association) Act, 1890, to obtain the sanction of the Court to proposed alterations in its memorandum of association although it has not been also registered under the Companies Act, 1862.

[His Lordship then heard the case on the merits, and granted the prayer of the petition.]

Solicitors—*Hollams, Son, Coward & Hawksley.*

IN RE BODEGA CO., LIMITED.

1903, November 25, 26. FARWELL, J.

Company—Director—Articles of Association—Secret Profit by Director—Automatic Vacation of Office—Re-election—Continuing Contract—Recovery of Director's Fees Paid under Mistake—Legal Consideration—Companies Act, 1862, Table A, clause 57.

A provision in the articles of association of a company that a director shall vacate his office on the happening of a certain event operates automatically and *ipso facto* as soon as the event occurs.

Turnbull v. West Riding Athletic Club, Leeds (1), not followed.

A provision that a director shall vacate his office on becoming secretly interested in any contract with the company operates only where the interest of the director is of such a nature that it may possibly be in conflict with the interest of the company—where the sphere of interest of the company is, to some extent at least, coincident with the sphere of interest of the director.

An action for the recovery of money had and received will lie even in cases where the money has been paid in remuneration of services actually rendered, provided that the services so rendered do not amount to a legal consideration. Services rendered do not amount to a legal consideration unless they have been rendered in response to some request, explicit or implied by law. The acceptance of services rendered is a *prima facie* ground for implying at law a request; but the Court is at liberty to resist this *prima facie* inference if warranted by the peculiar circumstances of the case.

A director vacated his office automatically by bargaining for a secret commission on the sale of certain property to the company. The fact was unknown to the company, and the director continued to act and to receive his fees as director. He was subsequently re-elected to office in the ordinary course on his supposed retirement by rotation. At the time of this re-election the sale in question was completed, with the exception of the payment of the secret commission, for which the director had a lien:—

Held, that the bare existence of this lien was not a sphere of interest in the contract on the part of the director in any degree coincident with the sphere of interest of the company—that the interest of the director and the interest of the company no longer came into conflict, and accordingly that the director did not vacate his office on re-election by reason of the existence of the lien.

Held, also, that, although the director, during the period between his vacating his office and his re-election, had rendered services to the company which had been accepted by them, yet, inasmuch as it was impossible for the Court to believe that the company would ever have requested him to render these services had they been aware of the true state of the facts, the Court could not imply a request for these services on the part of the

company from the mere fact of their ignorant acceptance of them; and accordingly that the services rendered did not amount to a legal consideration for the fees paid for them, and that the company were therefore entitled to recover these fees as money had and received.

THE Bodega Co., Limited (hereinafter called the company), was incorporated on 31 March, 1881, and on 24 December, 1900, the plaintiff Edward T. Wolseley was one of its directors.

On 24 December, 1900, the company entered into a contract for the purchase of the "Durham Ox" Inn, in the city of Nottingham, for the sum of 12,000*l.* Under this contract the plaintiff Wolseley was to obtain a secret profit or commission of 4,000*l.* Some question arose at the hearing of the motion as to whether this secret profit or commission was really to be paid to Wolseley; but in the end the case was provisionally decided by FARWELL, J., on the footing that Wolseley was implicated, though liberty was left to him to rebut this presumption, should he think proper, and be able to do so by the production of subsequent evidence.

The contract of 24 December, 1900, was subsequently carried into effect by a conveyance to the company dated 24 June, 1901; but the purchase-money to the extent of 4,000*l.*, which was to form the secret commission to Wolseley, had in fact never been paid by the company.

Clause 70 of the articles of association of the company enacted (*inter alia*) as follows: "The office of any director shall be vacated . . . if he be concerned in or participate in the profits of any contract with the company, not disclosed to and authorised by the Board."

This clause is practically identical with part of clause 57 of Table A to the Companies Act, 1862.

By clause 66 of the company's articles of association it was provided that three of the directors should retire by rotation in each year from and after the ordinary general meeting in 1891, but should be eligible for immediate re-election.

In accordance with this provision the plaintiff Wolseley vacated his office as director on 8 July, 1901, and on 8 July, 1902, but was immediately re-elected on each of these dates respectively.

On or about 10 February, 1903, the fact of the secret commission of 4,000*l.* was first discovered by the plaintiff's fellow-directors. In the meanwhile, during the period between 24 December, 1900 (the

date of the contract), and 10 February, 1903 (the date of the discovery of the secret commission), the plaintiff Wolseley had received the sum of 980*l.* odd in payment of his share of the directors' fees. These fees were not paid as fixed sums directly by the company to each individual director; but, under the provisions of clause 75 of the company's articles of association, an annual sum of 1,400*l.* was distributed among the directors in such a manner as a majority of them should direct. On 10 November, 1903, and 12 November, 1903, the plaintiff's two fellow directors during the period in question formally disclaimed, relinquished, and assigned all their respective rights and interests in the said sum of 980*l.* odd in favour of the company.

On 2 October, 1903, Wolseley executed to A. E. Walton a transfer of three hundred fully paid shares held by him in the company. The company, however, refused to register the transfer, on the ground that Wolseley was indebted to them in the sum of 980*l.* odd already mentioned, and on the ground that they accordingly possessed, in accordance with clause 21 of their articles of association, "a first and paramount lien" upon the shares in question.

Wolseley now moved the Court that the register of members of the company might be rectified by inserting therein the name of A. E. Walton as the holder of the shares in question.

Upjohn, K.C., and J. F. W. Galbraith, for the motion:

Clause 70 of the articles of association cannot operate automatically. In order to get rid of a director it is necessary to pass a resolution to that effect, and give the erring director an opportunity of defending himself: *Turnbull v. West Riding Athletic Club, Leeds* [1894] (1). This has not been done in the present case, and accordingly Wolseley has never ceased to be a director.

[FARWELL, J., referred to the criticism of this case in Buckley's Companies Acts (8th ed.), p. 571.]

But even if Wolseley automatically ceased to be a director on 24 December, 1900, yet the contract was completed and ceased to exist as a contract at the date of the conveyance of 24 June, 1901. Wolseley's re-elections on 8 July, 1901, and on 8 July, 1902, were

accordingly valid, and he is certainly entitled to his director's fees after the first of these two dates.

Assuming, however, that these fees, or some of them, have been paid to Wolseley under a mistake, yet the company, or the directors, are not entitled to recover them as money had and received. This action lies to recover money only where there has been a total failure of the consideration for the sake of which it was paid under mistake: Bullen & Leake's Precedents of Pleadings (5th ed.), p. 299, *Hunt v. Silk* [1804] (2), *Lambert v. Heath* [1846] (3), *Aiken v. Short* [1856] (4), *Clarke v. Dickson* [1858] (5), and *Nicholson v. Ricketts* [1860] (6). Here valuable services have been rendered to the company and directors by Wolseley during the period in question.

[FARWELL, J.: Must not the consideration which prevents this action from lying be a legal consideration—that is, a consideration moving from the one party at the request of the other? Is not the consideration alleged in this case a purely voluntary one, and not legal at all in the technical sense?]

That is immaterial: Leake on Contracts (4th ed.), p. 62.

[FARWELL, J., referred to *Moses v. Macferlan* [1760] (7).]

The action for money had and received will not lie except in cases of fraud, duress, and total failure of consideration. Here services have admittedly been rendered by Wolseley to the directors as well as to the company, so that, whether this money is sued for by the company or the directors, both must equally fail to recover it as money had and received.

Jenkins, K.C., and *A. Neilson*, for the company:

In *Turnbull v. West Riding Athletic Club, Leeds* (1), the attention of the learned Judge was drawn away from the real point at issue. It seems to have been assumed as common ground that a resolution

(2) 5 East, 449; 2 Smith, 15; 7 R. R. 739.

(3) 15 M. & W. 486; 15 L. J. Ex. 297.

(4) 1 H. & N. 210, 215; 25 L. J. Ex. 321, 324.

(5) E. B. & E. 148; 27 L. J. Q. B. 223; 4 Jur. (N.S.) 832.

(6) 2 E. & E. 497, 525; 29 L. J. Q. B. 55, 65; 8 W. R. 211; 6 Jur. (N.S.) 422.

(7) 2 Burr. 1005, 1012; 1 Wm. Bl. 219.

was necessary in order to cause the plaintiff to vacate his seat, and on that basis the Judge decided—and, no doubt, decided rightly—that, before such resolution was passed, the plaintiff ought to have enjoyed an opportunity of defending himself. The decision is therefore not really to the point. Much more to the point is *Hunnings v. Williamson* [1883] (8), from which it is clear that a provision for vacation of office under section 54 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), operates automatically. The language in that case is no more emphatic than the language of clause 70 of the present articles of association. Wolseley therefore vacated his seat automatically on 24 December, 1900.

With regard to the two re-elections to office on 8 July, 1901, and 8 July, 1902, the plaintiff's office was in each case immediately again vacated. Since the secret profit of 4,000*l.* had never been paid, he had at each of those two dates a vendor's lien for unpaid purchase-money; and this vendor's lien is of the nature of an implied contract in which the plaintiff was interested.

It is immaterial that the 980*l.* odd has actually been paid to the plaintiff, and that he has admittedly rendered valuable services to the company and directors. Those facts do not hinder the company from recovering the money thus paid by mistake. The fees of a director are paid to him for his services as a whole; and if he has failed in a single branch of his duty, he has forfeited all claim to any remuneration. The money cannot be apportioned—if he has forfeited any part of it, he has forfeited all. The company are thus entitled to refuse to pay the plaintiff the whole of his director's fee, though they have admittedly had certain benefits from his services: *Salomons v. Pender* [1865] (9). That commission money actually paid in ignorance of a secret profit made by the agent may be recovered is shown by *Andrew v. Ramsay & Co.* [1903] (10). Neither can the plaintiff retain this money on the ground of *quantum meruit*. A *quantum meruit* would have to be assessed. Moreover, to plead a *quantum meruit*, you must plead a request to do the work.

It is immaterial whether the company claim to recover the

(8) 11 Q. B. D. 533; 52 L. J. Q. B. 416; 49 L. T. 361; 32 W. R. 267; 48 J. P. 135.

(9) 3 H. & C. 639; 34 L. J. Ex. 95; 12 L. T. 267; 13 W. R. 637; 11 Jur. (N.S.) 432.

(10) 19 Times L. R. 620.

money directly, or claim as assignees of the directors. It is clear that each individual director could sue the company for the amount allocated to him by his fellow-directors. The company, on their part, can sue directly for the recovery of the allocated share which each individual director has actually been paid by mistake.

[FARWELL, J., referred to *Caridad Copper-Mining Co. v. Swallow* [1902] (11).]

Upjohn, K.C., in reply :

It is not true that there was any continuing contract in which Wolseley was concerned after the date of his first re-election on 8 July, 1901. A vendor's lien is a mere creation of equity—it is not of the nature of an implied contract in law. This is the better opinion : *White & Tudor, Equity Cases* (7th ed.), vol. ii., p. 934 ; *Storey, Equity Jurisprudence* (18th ed.), vol. ii., p. 554 ; *Fry on Specific Performance* (4th ed.), p. 591 ; *Chapman v. Tanner* [1684] (12), *Nairn v. Prowse* [1802] (13), *Mackreth v. Symmons* [1808] (14), and *Kettlewell v. Watson* [1884] (15), per LINDLEY, L.J.: “ although the lien arises from, and may in one sense be said to be created by, the contract of sale, still no contract to confer the lien is necessary, and in that sense the lien may be said to arise independently of contract.” This is clearly the better opinion, notwithstanding the statement to the contrary in *Robbins, Law of Mortgages*, p. 1372.

[FARWELL, J., referred to *Waring v. Ward* [1802] (16).]

It is incredible, again, that clause 70 should continue to operate in instance after instance, even if the contract in which Wolseley was interested be held to be a continuing one. It can only operate once for all—after that, it is done with altogether. In *Dawson v. African Consolidated Land and Trading Co.* [1897] (17) there was

(11) 9 *Manson*, 336 ; [1902] 2 *K. B.* 44 ; 71 *L. J. K. B.* 601 ; 86 *L. T.* 699 ; 50 *W. R.* 565.

(12) 1 *Vern.* 266.

(13) 6 *Ves.* 751, 759.

(14) 15 *Ves.* 328.

(15) 26 *Ch. D.* 501, 507 ; 53 *L. J. Ch.* 717, 720 ; 51 *L. T.* 135 ; 32 *W. R.* 865.

(16) 7 *Ves.* 332.

(17) 4 *Manson*, 372 ; [1898] 1 *Ch.* 6, 12 ; 67 *L. J. Ch.* 47, 50 ; 77 *L. T.* 392 ; 46 *W. R.* 132.

a provision for vacation of a director's office in case of his becoming bankrupt; yet it was held in that case that the election of a director already bankrupt was valid, even though there was no evidence to show that his electors were aware of the true state of facts.

FARWELL, J.: This case, under the guise of an innocent application to rectify the register, has raised a number of points of very considerable difficulty. [His Lordship stated the facts, and continued:] Now the first point that arises is this: Does a director who is concerned in an undisclosed contract, thereupon—to adopt the language suggested by Mr. Palmer in his *Company Precedents* (8th ed.), Part I., p. 615—vacate his office *ipso facto* or automatically, or does anything further remain to be done? In my opinion it is quite plain, on the words of article 70, that he vacates *ipso facto* or automatically, on the act being done. There is no distinction between this and the other events mentioned in the article, and it is clear that there is nothing more to be done in case he is adjudicated bankrupt, or becomes a lunatic—the moment the offence is committed, or the misfortune has occurred, there is no longer any *locus poenitentiae* for the erring, or unfortunate, director; there is no longer any means by which his fellow-directors can overlook his misfortune or condone his offence; the office is vacated automatically; and, if his fellow-directors still wish him to act, they must re-elect him in the ordinary course, or by invoking the special machinery that is provided by the articles in the case of a casual vacancy; they can do nothing to prevent the vacation of his office by an event over which they have no control—with which, indeed, they have nothing whatever to do except to satisfy themselves that the event has happened.

The decision of Mr. Justice KEKEWICH in *Turnbull v. West Riding Athletic Club* (1) has caused me some difficulty; but, as I read that case, the learned Judge was addressing his mind to a different set of circumstances. The article in that case was not absolutely identical with the article here. It practically amounted to this—that the director was to vacate his office if he contracted with the company, or was concerned in, or participated in, the profits of any contract with, or work done for, the company, without declaring his interest at the meeting of directors. The directors took on

themselves to call a meeting, and to declare vacant the office of a director who had rendered himself subject to the mischief of this rule; and what was said by the learned Judge really amounted to this—that, as these directors had chosen to call a meeting for the purpose of declaring vacant the office of the offending director, they ought, in common fairness, to have given him notice of it—to have given him an opportunity of defending himself, and to this I assent. But, if the learned Judge meant to go further than that, and to say that something more must occur than the mere happening of the invalidating event, and that the director might possibly have been so plausible that he might have won over his fellow-directors to condone what had happened—in that case I respectfully disagree with him. I cannot see what useful purpose it would have served had he won over every director on the board; the invalidating event would still have remained, and it would have been absolutely impossible to escape from it. The result, therefore, is that, in my opinion, Wolseley vacated office automatically on his being concerned in the contract.

What further happened was this: Wolseley was re-elected in the ordinary course on 8 July, 1901, and 8 July, 1902. Now the vacation of his office by reason of his participation in the contract of 24 December, 1900, was a vacation of his then office of directorship, and did not, in my opinion, disqualify him from being duly re-elected in a subsequent year. I do not understand article 70 to mean that, if a man be concerned in an undisclosed contract, and thereby vacate his office, he cannot be re-elected in a subsequent year. To my mind it is not a continuing disqualification, unless the work to be done under the contract—that is, the mischief aimed at under the article—is a continuing work. If the work to be done under the contract ought to be reviewed by the interested director—if the discretion which the company is entitled to expect from its director is to be exercised after his re-election over a matter in which he is still personally interested—then, and then only, his re-election would be avoided by reason of the continuance of the contract. But when, as in this case, the contract has been made once for all for a particular purpose, then I think the provision for vacation applies only to the holding of the directorship for the current year. I am therefore of opinion that Wolseley vacated the

office of director on his entering into the contract on 24 December, 1900, and did not again become a director until his re-election on 8 July, 1901.

It is true that at the date of this re-election the secret commission was still unpaid; and it has been argued that, after the conveyance to the company on 24 June, 1901, a lien arose for the unpaid purchase-money in favour of Wolseley. It is not necessary for me to decide whether that lien arose by implied contract, or by some implication of equity, or by some natural equity, all of which phrases are to be found in some of the cases. It is unnecessary to decide this, because I think that this lien, whatever was its nature, for all the purposes of the present case, came to an end with the execution of the conveyance on 24 June. The existence of this lien after 24 June, involved no further exercise of any discretion which would render the services of the director necessary. The mischief was then done, and could only be remedied by discovery, not by any exercise of the discretion. I hold therefore that the only period during which the claim for the repayment of the fees can be established is the period from 24 December, 1900, to 8 July, 1901.

And this leaves question, whether the sums actually paid to Wolseley during this period by way of directors' fees can be recovered, either as money paid under a mistake of fact, or on the ground of total failure of consideration. The action for money had and received has been stated by Lord MANSFIELD in *Moses v. Macferlan* (7) to lie, so far as material for this case, lies for money paid by mistake; or upon a consideration which happens to fail. The mistake must be a mistake "as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money," *per* Baron BRAMWELL in *Aiken v. Short* (4). The same proposition is involved in the second head—that is, total failure of consideration. I will deal with the company first in its own right. If the company were liable to pay it was because it had impliedly contracted with Wolseley to pay him for his services by requesting and accepting the benefit of those services, although he was not a director. Wolseley was not entitled under express contract, but claims on a *quantum meruit*. But a plaintiff cannot

recover for services rendered to and accepted by a defendant, unless they were so rendered at the defendant's request; the acceptance of the services by the defendant raises a presumption that such request was made, but this, like any other presumption, may be rebutted; and it is, in my opinion, rebutted if it be shown that the acceptance was given under such circumstances of mistake as to render it incredible that the services ever would have been accepted if the true fact had been known—at any rate in a case like the present, where Wolseley knew the true facts and knew that the directors were unaware of them.

If then, I apply Baron BRAMWELL's test, the money was paid under a mistaken belief that Wolseley was a director; if this had not been a mistake the company would have been liable. The other directors were further under the mistaken belief that Wolseley had done nothing that rendered it unfit for them to request him to perform the services of a director; if this had not been a mistake, they might have been liable to pay on the request implied from acceptance of his services.

Again, if I treat this as an action on the ground of total failure of consideration it is equally entitled to succeed; for consideration must mean sufficient consideration at law to support an action, and services rendered without request, express or implied, are not such.

Whether the claim be made by the company in their own capacity, or by the company as assignees from the directors, I do not think is very material. The company was bound to pay 1,400*l.* by way of director's fees, and that they have in point of fact paid a portion of that sum to some one who is not a director; however, the company can act only through its directors, and it may be that the directors could not claim the missing portion of their 1,400*l.* fees, as against the company, since they themselves are to blame for its having gone astray. They have, however, assigned all their claims in the sums paid to Wolseley to the company; and if the company have not suffered, the directors themselves have suffered, inasmuch as, wrongly believing that Wolseley was a fellow-director, they have given him a share of this 1,400*l.* which was to be divided among directors only, for his services as a director. The considerations that I have stated above apply as much to the directors as to the company for whom they acted.

The result, in my opinion, is that the fees paid to Wolseley from 24 December, 1900, to 8 July, 1901, must be refunded. With regard to money paid after that date, Wolseley was properly re-elected a director, and I have held that his re-election was not vacated merely because he had been guilty of conduct which, if known to the company, would have induced them to refrain from re-electing him. After that date he was a director, and has earned his fees; and so far as there is any claim to recover those fees I think the attempt must fail. But having regard to the fact that Wolseley is bound to refund his fees for the limited period from 24 December, 1900, to 8 July, 1901, and that he is indebted to the company for that amount; and having regard to the fact that the company is given a lien on Wolseley's shares by article 21 in respect of the money now owing—the only thing that I can now do is to refuse this motion for rectification with costs.

Solicitors: *Parker & Richardson*, for the motion.

Gadsden & Treherne, for the Respondent.

IN RE IBO INVESTMENT TRUST, LIMITED.

1903, November 12. BYRNE, J.

Company—Winding-up Petition—Dismissal with Costs—Contributories Opposing Petition—Taxation of Costs—Allowances in respect of Copies of Evidence.

Where the common order is made dismissing a winding-up petition with costs and the contributories are in the ordinary way allowed one set of costs between them, they will not upon taxation be allowed the usual charges consequent upon taking copies of the evidence filed by the petitioner and the company respectively. If any such allowances are desired, application must be made to the Court at the hearing of the winding-up petition.

In October, 1902, a petition for the compulsory winding-up of the Ibo Investment Trust, Limited, was presented by a shareholder. The petition, which contained a number of charges of fraud with reference to the conduct of the company by its directors, together with personal charges against some shareholders by name, was opposed by the company, by creditors,

and by two sets of contributories consisting of directors and non-directors respectively.

On 10 December, 1902, the petition came on for hearing before BYRNE, J., and he dismissed it with costs, and at the same time refused an application by the director contributories for a separate set of costs. The order dismissing the petition directed the petitioner to pay to the company and to the contributories opposing their costs of the petition to be taxed, "but on such taxation only one set of costs is to be allowed between the said contributories opposing the said petition."

In taxing the bill of costs of one set of contributories the Registrar disallowed the following classes of items: (1) Payment for copies of evidence in support of the petition in opposition thereto and in reply; (2) perusals of such evidence; (3) copies of such evidence for counsel; and (4) fees to counsel. Objections were taken to these disallowances as follows:—

"The ground of the objection is that personal charges of fraud having been made against the contributories both in the petition and in the evidence in support thereof, and the magnitude of the interests involved, the contributories were entitled to defend themselves and their interests against the petitioner's personal attack on them, and it was impossible for counsel representing them to adequately oppose the petition without having the evidence in support of the petition in opposition and in reply; and it was therefore necessary to take copies of such evidence and supply copies to counsel and to mark an adequate fee to counsel with his papers. It is submitted that a petitioner is in the same position as a plaintiff in an action (see Annual Practice, vol. 2, pp. 450, 451); and where fraud is charged the persons against whom the charges are made are entitled to take copies of all evidence filed in support or opposition. The petition having been dismissed with costs, it is submitted that the Taxing Officer is in error in adopting the same principle of taxation as where costs are to be paid out of the assets and only allowing a nominal sum for successful contributories, the result of the taxation in this case being that the whole amount allowed is not sufficient to pay one of their junior counsel's fees, and that although one set of costs only has been allowed by the order it should be a proper and a full bill."

The Registrar's answer to these objections was as follows:—

“It is not the practice to allow contributories or creditors appearing on a petition the usual charges consequent on taking copies of the evidence filed by the petitioner and the company, unless for some reason such evidence has to be answered by, or is in answer to, evidence filed by such contributories or creditors, or unless some other sufficient grounds are shown for the allowance of such charges. In this case allegations were made with reference to the conduct of the company by its directors and the defence of such charges was undertaken by the company, all the evidence in answer to such charges being prepared and filed on behalf of the company, and the costs relating thereto have been allowed in the company's bill of costs. The hearing of a petition to wind up a company in which charges are made against it by reason of the acts of its directors, is not a proceeding like an action in which fraud is alleged against defendants, and such defendants have consequently to defend themselves, but the allegations are made against the company, and the company alone is respondent to the petition. The directors need not appear at all, and if they do it is not the practice of the Court to go into and adjudicate upon their conduct in the same way as it would were the Court trying an action in which the directors were defendants charged with fraud. I know of no case in which the winding-up Judge has allowed directors appearing on a winding-up petition in which fraud was alleged any extra cost for defending their conduct as directors. It is the usual practice to allow them (if the petition is unsuccessful) a set of costs as contributories, or a share in such set of costs as was done in this case. These directors applied at the hearing of this petition for a separate set of costs, but that was refused and they were told they would get a share of the contributories' costs. Were contributories and creditors allowed the charges consequent on taking copies of evidence filed by the petitioner and company there would be several sets of solicitors taking copies of the same evidence, clearly an extravagant practice. It is not usual for the contributories and creditors to answer such evidence, and they did not do so in this case. The petition itself nearly always contains sufficient information to enable contributories and creditors to decide whether they will support or oppose, and that is all they are required to do.

It cannot be said that the petition in this case was deficient in such information. WRIGHT, J., long ago laid down the practice that he would not hear long speeches on behalf of contributories or creditors on the merits, but made them confine themselves to either supporting or opposing the petition. The fight is between the petitioner and the company. In this case the directors are represented by the same solicitors as the company. In accordance with the usual practice, their names ought to have been put on the company's brief (see *In re Brighton Marine Palace and Pier Co.* [1897] (1)). When they applied for a separate set of costs and were refused, the Judge intimated that as contributories they would get a share of the contributories' set of costs. It was not brought to the Judge's attention (the official in Court not being aware of it at the time) that the same solicitor represented the company and the directors, or doubtless the usual practice would have been followed and the directors would have had no share in the contributories' set of costs. The fact that the same solicitors represented the directors and the company was noticed when the order came to be settled, but having regard to the Judge's intimation when deciding the question of costs, the order was settled in accordance with such intimation.

"I have disallowed the objections."

This summons was thereupon taken out on behalf of the contributories, asking for an order that the objections of the applicants to this taxation might be allowed, and that the matter might be referred back to the Registrar to vary his certificate accordingly.

Gatey for the applicants :

The objections to the taxation in question ought to be allowed. It is a question of principle, whether contributories, either directors or merely contributories, who are personally attacked in the petition, are entitled to the costs of copies of the evidence filed in support of the attack upon them. They cannot possibly defend themselves against the charges brought against them without seeing the evidence. They are therefore bound for their own protection to

(1) W. N. (1897) 12; 32 L. J. N. C. 90.

take copies of such evidence, and ought to be allowed the costs of the same.

Buckmaster, K.C., and Kirby for the petitioner :

On the hearing of a winding-up petition the Court only deals with charges made against directors or shareholders in so far as such charges have reference to the question whether the case for a winding-up order has been established. The only question before the Court is whether or not the company ought to be wound up. The ordinary rule as to the costs allowed to contributories has been found to work satisfactorily. Costs of evidence ought only to be allowed under very exceptional circumstances, and when special direction is given in the order dismissing the petition ; they should not be allowed under the common order. The Registrar has correctly stated the practice, and this application should consequently be dismissed.

Gatey replied.

BYRNE, J., after referring to the nature of the application and of the objection to the disallowances by the Registrar, continued : The petition, as I have every reason to remember, was one which I do not think I should describe unfairly if I said that it was stuffed with charges of fraud. Counsel for the petitioner in his discretion selected six charges of fraud, and certain portions only of the evidence relating to those charges was read, and the whole of it was not gone into before the Court. Counsel for the applicants is entitled to say that it was a petition containing charges of fraud against certain directors and certain contributories. The petition came on and was dismissed. There was an application made to me at the time to allow a separate set of costs for the director contributories appearing. I declined to do so, and only one set of costs was in the ordinary form allowed to the contributories. [His Lordship then read the order, and after referring shortly to the facts in reference to the taxation continued :] The learned Registrar, in answer to the objections of the contributories, has pointed out, and justly pointed out, that the proceeding by petition for winding up a company in which charges are made against the directors others than the company is not, as respects

persons appearing on the petition other than the company, analogous to an ordinary action in which fraud is charged against defendants. The case has to be made out by the petitioner and the defence to the petition falls on the company, and it is for the company to adduce evidence for that purpose. In this case the contributories did what appears to me to have been the right thing to do—they swore affidavits in support of the opposition by the company.

As the company gets all the proper costs of the evidence furnished and all proper payments and charges in respect of giving evidence for the party to any litigation, payment for giving evidence is a matter between the party taking the evidence and the witness giving it. When the case came on the company contested it. They opposed the petition with the evidence so furnished to them. The contributories and creditors may appear if they like upon the petition, at the risk of course of having to bear their own costs, for the purpose of expressing their approval or disapproval of the petitioner's application, and opposing or supporting it as the case may be; but beyond that, any hearing by the Court of evidence in support of the merits of the case is, I apprehend, quite a matter of discretion. I am told it was the practice of one of my predecessors never to allow parties so appearing to be heard upon the merits; but they were merely heard to say whether they supported or opposed. Now, I lay down no general rule on the subject, but I want to point out before adding more that it has been most justly said that it would be a curious thing if a petitioner in making a necessary allegation against the company to support his petition had to make charges involving other persons, that those persons should have conferred on them the same rights as they would have had if they were defendants to an action brought against the company and against themselves. The petitioner would have no right to get costs as against them, whereas they would, on the footing of allowing their costs as hostile litigants, be entitled, if the Court should so direct, to get costs against the petitioner. I do not want to lay down any rule as to what the discretion of the Court may be in a matter of costs of persons appearing on the hearing of the petition; but I think it is clear that the common order does not give to contributories so appearing any other costs than those the

Registrar is prepared to allow in the present case, and that if more is wanted it must be asked for at the time of the hearing of the petition.

In my judgment the reasons given by the learned Registrar appear to be sufficient for the course he has taken, and I cannot accede to the demand for a review of the taxation under the circumstances, and I therefore dismiss the application.

Solicitors : *Pritchard and Sons ; Ashurst, Morris, Crisp & Co.*

IN RE BURNAND, EX PARTE WILSON.

1904, March 18. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

*Bankruptcy—Insurance—Underwriting at Lloyd's—"Names"—Bankruptcy of
Underwriter—Right to Books.*

Prior to his bankruptcy the debtor carried on business as an underwriter at Lloyd's on his own account and as agent for four other persons or "names." By agreement with each of the "names" it was provided that proper underwriting and account books should be provided and kept, and be always open to the inspection of the "name," and the "name" should pay to the debtor an annual sum as a remuneration for his services in conducting the business, for keeping and providing books and papers, and for providing an office and clerks, and other outgoings. The debtor kept ledgers in which was a separate column for the transactions done for each "name," and another for his own transactions in respect of the same matters. At the date of the bankruptcy the books were in the hands of a firm of accountants who, on instructions from the "names," declined to deliver them up to the trustee in the bankruptcy:

Held, that the inference from the agreements was that the debtor and the "names" were all interested in the books, and the debtor's agency having come to an end he had no greater right to the books than the "names," and his trustee had no right to the exclusive possession of them; but that the "names" must undertake to give the trustee such inspection of the books and facilities for making extracts from them as might be reasonably required.

FROM 1881 to 1903 P. G. C. Burnand carried on business as an underwriter at Lloyd's. In addition to underwriting on his own account, he acted since 1892 as agent for four other persons (and a fifth with whom the present application was not concerned), technically known as his "names," under agreements entered into severally with each of them. The agreements were substantially identical.

The agreement with R. J. Elwell, one of the "names," after reciting that Elwell was desirous of carrying on the business of an underwriter at Lloyd's and of appointing Burnand to conduct such business on his behalf, provided as follows:

Article 1: "The said P. G. C. Burnand shall until the first day of January 1893 and for such longer period as is hereinafter mentioned determinable nevertheless as hereinafter provided act as the agent of the said R. J. Elwell for the purpose of underwriting policies of insurance at Lloyd's and carrying on the ordinary

business of an underwriter at Lloyd's in the name and on behalf of the said R. J. Elwell in accordance with the usual custom of Lloyd's and upon the terms and conditions hereinafter contained."

Article 2 provided that Burnand should have the management of the underwriting, and all risks should be taken and all losses, averages, and returns settled by him in the name and on account of Elwell.

Article 3 provided for the opening by Elwell of a banking account for the service of the business, and gave power to Burnand to draw cheques on it in Elwell's name. All receipts in respect of the underwriting business were to be paid into this account, and all losses and outgoings paid out of it, or by Elwell if the account should prove insufficient.

Article 5: "Proper underwriting and account books shall be provided and kept in the usual manner and shall at all times be open to the inspection of the said R. J. Elwell or his agent thereunto appointed in writing and the said P. G. C. Burnand shall at all times give to the said R. J. Elwell such information and explanations as to the books or the state of the account as he may require. The said books and accounts if required by the said R. J. Elwell shall be periodically audited by a professional accountant and the expense of such audit shall be an outgoing within article 3 hereof."

Article 6: "The said R. J. Elwell so long as the underwriting is carried on under this agreement shall pay to the said P. G. C. Burnand while he shall duly perform the engagements on his part herein contained as a remuneration for his services in conducting the said underwriting business for keeping and providing books and papers and for providing a proper office and clerical assistants and all other outgoings and expenses connected with the underwriting business save and except the said R. J. Elwell's annual subscription to Lloyd's and the expenses of auditing the accounts in accordance with article 5 hereof the sum of 250*l.* per annum which sum shall be payable quarterly and treated as outgoings of the said business. The said R. J. Elwell shall also pay to the said P. G. C. Burnand in respect of the said underwriting of each year during the continuance of the underwriting as a remuneration for his services in conducting the same such a commission or further

sum as shall be equal to 20 per cent. of the net gains or profits if any of each year to be ascertained and paid at the times and in manner hereinafter mentioned."

Article 7: "Nothing in this agreement contained or in the business to be carried on thereunder shall constitute a partnership between the parties hereto."

Article 8 provided for the manner in which the profits should be ascertained.

Under article 11 the annual payment of 250*l.* to Burnand was to cease on the determination of the underwriting business, which (article 12) was to be carried on till determined on notice. Lastly, article 13 referred disputes to arbitration.

The books kept by Burnand for the purposes of, and in pursuance of, the underwriting agreements were the ordinary books kept by an underwriter for himself and his "names," and showed, in six columns, the several sums receivable by, and the several liabilities against, himself and his "names," on the business transactions. He kept separate books for his own separate transactions in which the "names" had no interest.

The books were kept duly posted up by a firm of chartered accountants, the fees for posting being paid by Burnand and the "names" in equal shares.

In September, 1903, Burnand was adjudicated a bankrupt on his own petition.

At that time the books were in the possession of Messrs. Baker, Sutton & Co., chartered accountants, who had been in the habit of posting them.

On 5 November F. B. Wilson was appointed trustee of the bankruptcy.

The trustee applied to Messrs. Baker, Sutton & Co. for delivery over to him of the books for the purpose of the winding-up of the estate; but they declined, upon instructions from the "names," to hand them over except on conditions which the trustee was unwilling to accept.

At this time an appeal was pending in an action—(*Hambro v. Burnand*) [1908] (1)—against Burnand and the "names" in respect

(1) [1903] 2 K. B. 399; 72 L. J. K. B. 662; 89 L. T. 180; 51 W. R. 652; 8 Com. Cas. 252.

of certain transactions which were entered in the books. The "names" suggested that, if the books were handed over to the trustee, they might in his hands be improperly used for the purpose of the action, and they required an undertaking from the trustee to use them only for the purposes of the bankruptcy. The trustee, who only intended to use the books in the proper exercise of his duty for the purposes of the bankruptcy, thought he ought not to be asked to give any such undertaking, and declined to give it.

The trustee thereupon gave notice of motion for an order that Messrs. Baker, Sutton & Co. should deliver up the books to him.

The motion was heard before BUCKLEY, J., on 7 and 8 March, 1904.

S. G. Lushington, for the trustee :

Section 50, sub-section 1, of the Bankruptcy Act, 1888, provides that "the trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery"; and by Rule 349 of the Bankruptcy Rules, "no person shall, as against the Official Receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon." The books in question are the debtor's books, the "names" have a mere right of resort to them. The trustee is entitled to have them.

Muir Mackenzie, for Messrs. Baker, Sutton & Co. :

The "names" have as much right to the books as a solvent partner has to the partnership books when a co-partner becomes insolvent: *Lindley on Partnership* (6th ed.), p. 687. It is true no partnership existed between the debtor and the "names," but the analogy is just.

[BUCKLEY, J. : The analogy seems to me to fail.]

The effect of the agreements was that, if the debtor should become incapable of carrying out the underwriting arrangement he was to give up the books. Even if they are not legally the "names'" books, there was an agreement that, on the debtor ceasing to be a

member of Lloyd's, the books should be theirs. The custody by the debtor was only to continue so long as he performed the contract. A trustee in bankruptcy only takes subject to the bankrupt's obligations and contracts.

BUCKLEY, J.: Messrs. Baker, Sutton & Co., the respondents in this case, have not, and do not claim to have, any property in the books; but they set up a *jus tertii*. They say that, although the trustee as representing the bankrupt has and they have not a property in them, yet the trustee is not entitled to demand them from them because the "names" have also a property in them. But the respondents have no right to the books as against any one who has a property in them, and I might dispose of the case on that ground alone; but I propose to deal with it upon a consideration of what appear to me to be the rights as between Burnand and the "names."

It seems to me the position is to be treated in the same way as if there were no bankruptcy—as if the "names" had come to Burnand and said, "Deliver up to us the books." The books were provided and kept under the provisions of the contracts made between Burnand and the "names." I have the agreement with Elwell before me, but all the agreements may be taken to be in substance the same. That agreement provides that Burnand shall act as Elwell's agent to carry on the ordinary business of an underwriter at Lloyd's, and then, under article 5, "proper underwriting and account books shall be provided and kept in the usual manner and shall at all times be open to the inspection of the said R. J. Elwell or his agent thereunto appointed in writing and the said P. G. C. Burnand shall at all times give to the said R. J. Elwell such information and explanations as to the books or the state of the account as he may require." Pausing for a moment, there would seem to be no use in providing by the contract for inspection if the books were to be Elwell's and not Burnand's, so that it looks so far as if they were intended to be the property of Burnand, and Elwell was to have contractually the right to inspect them. Then article 6 provides that Elwell shall pay Burnand "as a remuneration for his services in conducting the said underwriting business, for keeping and providing books and papers, and for providing a

proper office and clerical assistants and all other outgoings and expenses" the sum of 250*l.* a year. So Burnand was to find the office and pay the rent, provide clerks and pay their salaries, provide the books and, as I read the agreement, pay for them. In my opinion the books were to be provided by Burnand at his own expense, in return for which he was to receive a remuneration.

The books contain entries in six columns, which show the various sums receivable by, and the liabilities against, the five "names" and Burnand, arising out of the business transactions—transactions in respect of which each of the six persons was severally liable. Read, one of the "names," could not, as against Elwell, have asked for the books, and so as regards every other of the "names" and as regards Burnand himself. The books were not the property of any one of them as against the others. Who, then, was entitled to the possession? Under the agreements Burnand was to provide and keep and have the custody of the books. The books may contain matter in respect of which the "names" were liable to third parties, but I think, nevertheless, they were Burnand's books. [His Lordship then referred to, and declined to entertain, the suggestion that the trustee would not act *bonâ fide* and use the books solely for the purposes of the bankruptcy, and concluded:] As between the trustee and the respondents, I hold that the trustee is entitled to the books.

Baker, Sutton & Co. appealed.

Montague Lush, K.C., and *Muir Mackenzie*, for the appellants:

If a man is paid for keeping books for another, and recording in them his transactions on behalf of the other, he is agent for that other, and cannot set up any right to the books against his principal. The Judge was mistaken in thinking that a steward could retain as against his employer the books that he kept in the course of his employment. The appellants are willing to allow the trustee to inspect the books.

Scrutton, K.C., and *S. G. Lushington*, for the trustee:

The books contain entries relating to the debtor's own business, as well as to the business of the "names." The trustee is not

content with a mere right of inspection. He wants the books. Assuming that the debtor was in the position of an agent, he would still be entitled to the books. The duty of an agent is to keep an account and communicate the result to the principal. The books are the books of the agent, subject to the right of the principal to know the contents. The termination of the agency, therefore, does not affect the right of the agent to the books. There is no direct authority on the question, but *Tipping v. Clarke* [1848] (2) was a case somewhat of the same kind.

Montague Lush, K.C., replied.

VAUGHAN WILLIAMS, L.J.: I think that this appeal ought to be allowed. With regard to the arrangements that were entered into, so far as I can judge from the agreements themselves, I doubt very much whether one ledger for the five "names" (and I am now dealing only with the five names) was ever intended by these agreements at all. I think that what was intended was that each of these "names" should pay a lump sum which was to cover the expenses, including the expense of the books and papers, incurred on his behalf. If that had been carried out, I should have supposed that the result would have been that, whatever right of retention of the books Burnand might have had during the continuance of the agency, so soon as the agency came to an end each one of these "names" would have been entitled to his own books. But that is not the system which was actually adopted, and there is this common book kept, with the five columns for the five "names," and another column—making six in all for the purpose of entering transactions of Burnand in respect of the matters in which the "names" were interested, Burnand keeping separate books for his own business as an underwriter. I think that the proper inference from this ought to be that in fact the "names" knew of and acquiesced in the account being kept in that shape. But whatever may be the proper inference to draw from that, the most favourable possible inference would be that all the six—that is, Burnand and the five "names"—had an interest in these books, had the property in these books. Now, Burnand's agency having come to an end, he

can have no greater right to them than the other five. The other five, through the accountants, are in possession and have the control of this ledger, and I do not think that any order ought to be made at the instance of Burnand that he, or the trustee as representing him, should have exclusive possession of these books, but I think that they should be allowed to remain with the accountants. It is, however, manifestly right that the trustee in bankruptcy should have inspection of the books or facilities for extracting what he requires from them, and I understand that counsel for the appellants are willing that he should have those facilities.

Under those circumstances, I think it is enough to say here that the order of the learned Judge below must be discharged, counsel undertaking on behalf of the five "names" that such inspection shall be given as may be reasonably required; and this appeal must be allowed with costs.

STIRLING, L.J.: I am of the same opinion. Burnand, who carried on business as an underwriter, entered into five separate agreements with five gentlemen, under each of which he was to carry on a separate business for the benefit of the gentlemen with whom he contracted. I take as an example, as the learned Judge did in the Court below, the agreement between Burnand and Elwell of 9 February, 1892. That deals with an underwriting business to be carried on at Lloyd's in the name and on behalf of Elwell by Burnand. The question which arises here is as to who is entitled to the books. [His Lordship referred to articles 5 and 6 of the agreement, and continued:] Elwell is the owner of the business. He provides all the money for carrying it on. All the money which Burnand gets in respect of this transaction is to be paid into that account, and all the expenses are to come out of that account. The business is Elwell's, and Elwell's alone. It seems to me that if the agreement was strictly carried out, in the absence of any evidence as to there being any particular manner recognised at Lloyd's as to keeping the books which are kept in the usual course of business, the proper course would be that Burnand should provide separate books in which these transactions should be recorded, and then those books, being books paid for by Elwell

relating to Elwell's business, would be Elwell's books. If that were the state of things, it seems to me that Burnand, after the agreement had come to an end, would have no right to retain the books, because they would be Elwell's books and not Burnand's. If Burnand for his own protection required to keep books as to the dealings between himself and Elwell, he ought to keep those books separate, just as he would keep his own transactions separate. But the books which recorded transactions in the business which he carried on on behalf of Elwell with outsiders, which transactions were Elwell's transactions, ought to belong to Elwell.

However, that is not what was done. What was done was that one set of books as regards all the transactions into which these six gentlemen—Burnand and the five others—entered, was kept, and entries were made as to all those transactions in these books. As regards transactions which Burnand entered into on his own account exclusively, a separate set of books were kept. Those were Burnand's books, and those books have been handed over to the trustee in his bankruptcy. But as regards these books, the transactions are recorded in them, and they do not strictly satisfy the requirements of the agreement. It seems to me that the result is that at the most Burnand has got a joint interest in the books with the five gentlemen with whom he has entered into these agreements, and they must be taken to have been well aware of the mode in which the entries were made, the business having been carried on for a long time in this way. I think that under these circumstances Burnand cannot be held to have a claim which overrides that of the five others. Therefore I am unable to agree with the decision of Mr. Justice Buckley that the books ought to be handed over to the trustee. At the same time, having regard to what has happened, it seems to me that each of these five gentlemen has recognised to a certain extent Burnand's interest in the books, because he has kept his own transactions in them; and, although the books remain in the possession of the five, access ought to be given to Burnand's trustee at all reasonable times and for all proper purposes to inspect the books. I understand that that is really not disputed.

COZENS-HARDY, L.J.: I am of the same opinion, and I have really little to add. In the Court below the objection was taken

that the accountants could not rely on a *jus tertii*—that is to say, the right of the five “names.” That objection was not relied upon here, and the question has been treated, as in fact it is, as one between Burnand’s trustee on the one hand, and the five “names” on the other. For the reasons which have been given by my Lord and by Lord Justice STIRLING, I can see no justification for requiring the five to give up the books to Burnand’s trustee, who at the utmost is only jointly interested with the other five. But I think the undertaking which has been offered by counsel should be given by the five and not by the accountants, who, of course, might be discharged at any moment. Counsel for the appellants, I suppose, will undertake to appear for them.

Appeal allowed.

Solicitors : *Parker, Garrett, Holman & Howden*, for the Trustee.
Ward, Bowie & Co., agents for *Baker, Sutton & Co.*,
 for the Respondents.

IN RE O. C. S.

1904, May 6. C. A. VAUGHAN WILLIAMS, STIRLING, AND
 COZENS-HARDY, L.JJ.

Bankruptcy—Act of Bankruptcy—Defective Bankruptcy Notice—Insertion of more than one Judgment Debt in Same Notice—Amendment—Bankruptcy Act, 1883, s. 4, sub-s. 1 (g), s. 143.

A bankruptcy notice was defective by reason of its being based upon two judgment debts :

Held, that the Court ought not to allow the notice to be amended.

Decision of CAVE, J., in *In re Collier, Ex parte Dan Rylands* (1), followed and applied.

THIS was an appeal by the alleged debtor asking that a receiving order made against him by Mr. Registrar Linklater might be rescinded and discharged, and that the petition upon which the order was made might be dismissed.

The alleged act of bankruptcy was the non-compliance by

(1) 8 Morr. 80, 83; 64 L. T. 742.

the appellant with a bankruptcy notice served upon him. The bankruptcy notice was for a sum of 659*l.* 1*s.* claimed by the petitioning creditors as being the amount due on two final judgments obtained by them against the appellant in the King's Bench Division. The judgments were for 250*l.* 18*s.* 5*d.* and 408*l.* 2*s.* 7*d.* respectively. The appellant opposed the petition on the merits, but no objection was taken on his behalf before the Registrar that the bankruptcy notice was invalid by reason of its being based upon two judgments.

H. Reed, K.C., and A. H. Carrington, for the debtor :

The notice is bad. Two judgments cannot be included in the same bankruptcy notice under the Bankruptcy Act, s. 4, sub-s. 1 (g) : *In re Low, Ex parte Argentine Goldfields, Limited* [1890] (2).

Montague Lush, K.C., and H. Kisch, for the petitioning creditors :

The Court has a power of amendment under section 143 of the Bankruptcy Act, 1893, and this is a case in which the power should be exercised. *In re Low* (2) was a different case from this. The judgments there were each for 30*l.* only. In this case each judgment is for a substantial sum, well over 50*l.*

[VAUGHAN WILLIAMS, L.J. : It is contended that, because each of these judgments is for a sufficient sum within section 6 of the Bankruptcy Act, 1883, the putting them together in one bankruptcy notice is not wrong ?]

No ; but it may be a ground for exercising the discretion as to amendment under section 143. No injustice would be done by setting this matter right.

[STIRLING, L.J. : Section 143 seems to apply to formal defects only.]

The section might be so read, but that would not be the right

(2) 7 Morr. 302 ; [1891] 1 Q. B. 147 ; 60 L. J. Q. B. 265 ; 63 L. T. 694 ; 39 W. R. 181.

reading. The section speaks of substantial injustice being caused by the defect, and that could not be caused by a mere formal defect.

[VAUGHAN WILLIAMS, L.J.: It is important that the necessary preliminaries of a bankruptcy notice should be complied with, and the Court ought to be strict as to allowing an amendment: *In re Collier, Ex parte Dan Rylands* [1891](1). But if no substantial injustice would be caused by the amendment it could be allowed: *In re Wenham, Ex parte Battams* [1900](3).]

H. Reed, K.C., referred to *In re Bassett, Ex parte Lewis* [1895](4).

VAUGHAN WILLIAMS, L.J.: It is not in dispute that the bankruptcy notice in this case is defective by reason of its being based on two judgments, but it is said that we ought to allow it to be amended. I think, having regard to the decision of Mr. Justice CAVE in *In re Collier, Ex parte Dan Rylands* (1), that we ought not to allow this bankruptcy notice to be amended. Speaking from my own experience as a Judge in bankruptcy, I think I may say that in bankruptcy administration that decision has been acted upon consistently for a great many years, and we ought not to depart from that practice. Counsel for the petitioning creditors say that the appellant has not been misled by the notice, and no injustice would be done by its amendment. I am not so sure about that; but whether that is so or not, we ought to be very careful about allowing the amendment of a bankruptcy notice, which, if not complied with, involves consequences of a more or less penal nature. We must therefore refuse leave to amend, and the appeal succeeds, the appellant being granted the costs of the appeal. As regards the other costs, up to the hearing he was not in fault, as his notice of objection would have let in this point which has been taken here, but if he had taken the point earlier the costs of the actual hearing would have been saved, so he must be deprived of

(3) 7 Manson, 309; [1900] 2 Q. B. 698; 69 L. J. Q. B. 803; 83 L. T. 94; 48 W. R. 627.

(4) 2 Manson, 177; 43 W. R. 427.

the costs of the actual hearing, but he will only be deprived of costs to that extent.

STIRLING, L.J. : I agree.

COZENS-HARDY, L.J. : I agree.

Appeal allowed.

Solicitors : *Raphael & Co.*, for the Appellant.
Beyfus & Beyfus, for the Creditors.

IN RE GASKELL, EX PARTE GASKELL.

1904. April 29. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

Bankruptcy—Discharge conditional on Bankrupt consenting to Judgment—Refusal to Consent—Re-hearing—Bankruptcy Act, 1890, s. 8, sub-s. 2—Bankruptcy Rules of 1886 and 1890, r. 240, sub-r. 3—Form 63A.

The bankrupt was a captain in the army with no means but his pay, and his insolvency was due to damages given against him in an action for breach of promise of marriage, the plaintiff being the only creditor. The Registrar made an order for the bankrupt's discharge on condition of his consenting to judgment for 600*l.* being entered against him, to which he refused his consent. On a rehearing of his application for a discharge under Rule 240, sub-rule 3, the Registrar substantially repeated his former order. The bankrupt appealed, and asked for an order suspending his discharge for two years only under section 8, sub-section 2 (ii.) :

Held, that, though the bankrupt was not entitled to such an order as of right, it was a proper order to make under all the circumstances of the case.

THIS was an appeal against an order of Mr. Registrar Hope.

T. K. Gaskell, who was a captain in the Indian army, was adjudicated a bankrupt on 22 April, 1903, upon his own petition. His liabilities amounted to 1,625*l.* 16*s.* 8*d.*, and his assets had hitherto realised 61*l.* 17*s.* 8*d.*, and he had since received a legacy of about 12*l.* The bankrupt attributed his failure entirely to his liability for 1,500*l.* damages and costs, under a judgment obtained against him in an action for breach of promise of marriage, the plaintiff in that action being the only scheduled creditor. The bankrupt's full pay and allowances when on active service amounted

to 460*l.* He had no private means. The assets were not equal to 10*s.* in the pound. Under these circumstances the bankrupt applied for his discharge.

Mr. Registrar Hope, in giving judgment on 26 November, thought that this was not a case in which he ought to make any order affecting the bankrupt's pay, and he granted an order of discharge under section 8, sub-section 2 (iv.) of the Bankruptcy Act, 1890, upon condition that the bankrupt should before the signing of the order consent to judgment being entered against him in the King's Bench Division for 600*l.*, being part of the balance of the debts provable in the bankruptcy which was not satisfied at the date of that order, and 1*l.* 10*s.* costs of judgment, not to be enforceable without leave of the Court. The bankrupt not having given the requisite consent within a month of the making of this order, the Official Receiver applied under Rule 240, sub-rule 8 of the Bankruptcy Rules, 1886 and 1890, for a rehearing of the bankrupt's application for his discharge. Upon the rehearing the Registrar, on 26 February, made the order now appealed from, which recited the order of 26 November, 1903, and the non-consent of the bankrupt, and that in pursuance of the Bankruptcy Rules, 1886 and 1890, r. 240, sub-r. 1, such conditional order had not been signed, completed, or delivered out, and that the Official Receiver applied under Rule 240, sub-rule 8, for a rehearing of the bankrupt's application for his discharge, and continued: "And whereas upon such application coming on for hearing this day the following order was pronounced viz. that the said order of the 26th day of November 1903 be varied in manner following, namely, The said judgment for 600*l.* shall be deemed to be satisfied when together with the assets realised or to be realised in the bankruptcy the Official Receiver shall have received a sum sufficient to pay 7*s.* 6*d.* in the £ to the creditors herein by way of dividend and, without prejudice and subject to any execution which may be issued on the said judgment with the leave of the Court, that the said sum be paid out of the future earnings or after-acquired property of the bankrupt in manner following, that is to say, after setting aside out of the bankrupt's earnings and after-acquired property a yearly sum equivalent to the pay and allowances of the bankrupt for the time being as a captain in the Indian army for the support of himself and his

family (if any), the bankrupt shall pay the surplus (if any) to the Official Receiver for distribution among the creditors in the bankruptcy. An account shall on the 1st day in March in each year or within 14 days thereafter be filed in these proceedings by or on behalf of the bankrupt setting forth a statement of the receipts from earnings after-acquired property and income during the year immediately preceding the 1st day of January then last past, and the surplus payable under this order shall be paid by the bankrupt to the Official Receiver within 14 days of the filing of the said account. And whereas upon such order being this day pronounced counsel for the bankrupt stated that the bankrupt would not consent to such judgment as aforesaid and asked that the bankrupt's discharge be granted subject to a suspension for 2 years, Now the Registrar does not think fit to make any further order than the said order pronounced on the 26th day of November 1903 so varied as aforesaid by the said order pronounced this day."

The bankrupt appealed, and asked that an order for his discharge might be made suspending his discharge for two years only. The Official Receiver reported that the bankrupt's assets were not equal to 10s. in the pound on his unsecured indebtedness, and in answer to a question from the Court stated that there was no other reason in the conduct of the bankrupt for suspending his discharge. The Bankruptcy Act, 1890, s. 8, sub-s. 2, provides that the Court shall, on proof that the bankrupt's assets do not amount to 10s. in the pound, either "(i.) refuse the discharge, or (ii.) suspend the discharge for a period of not less than two years, or (iii.) suspend the discharge until a dividend of not less than 10s. in the pound has been paid to the creditors, or (iv.) require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the Official Receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge," the balance to be paid out of the future earnings or after-acquired property of the bankrupt, as directed by the Court, and execution not to be issued on the judgment without leave of the Court. Rule 240, sub-rule 8, of the Bankruptcy Rules, 1886 and 1890, provides that "if the bankrupt does not give the required consent within one month of the making of the conditional order, the Court may, on the

application of the Official Receiver or trustee revoke the order or make such other order as the Court may think fit."

H. Reed, K.C., and T. E. Haydon, for the appellant :

Judgment cannot be entered against the bankrupt under section 8, sub-section 2 (iv.), without his consent, and when he refuses to consent it is not competent for the Registrar on a rehearing under Rule 240, sub-rule 3, substantially to repeat his former order.

[They were stopped on this point.]

Muir Mackenzie, for the creditor :

The Court can impose as a condition of discharge that the bankrupt shall consent to judgment. The Registrar has followed Form 63A of the Bankruptcy Forms.

VAUGHAN WILLIAMS, L.J., read the terms of Rule 240, sub-rule 3, and continued: I do not wish it to be supposed that in a case like the present, where the bankrupt has refused his consent and the Official Receiver has asked the Court to revoke the order and the Court has revoked it, the bankrupt can dictate to the Court that the only other order to be made is simply to suspend his discharge for two years, because the Court might equally well suspend the discharge till a dividend of 10s. in the pound has been paid to the creditors. Under these circumstances, my doubt was whether we ought to send this case back to the Registrar to make such other order as he thinks right or to deal with the matter ourselves; but I think that we ought to deal with it ourselves unless we have reason to suppose that the debtor has been guilty of some conduct which might lead us to think that merely to suspend his discharge for two years would be too lenient a course to adopt. But the Official Receiver, being asked whether he knew of any such conduct on the part of the debtor besides that which we have heard, does not bring to our attention that any such facts are within his knowledge. Under these circumstances there is no reason for thinking that it will not be a sufficient order, having regard to the terms of section 8, sub-section 2 of the Bankruptcy Act, 1890, to suspend the bankrupt's discharge for two years. After all, the overriding intention

of the Legislature, as shown in all Bankruptcy Acts, is that the bankrupt, upon giving up the whole of his property, shall again be a free man, able to earn his livelihood and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt shall be free immediately—he must pass a period of probation; and theoretically there may be cases in which he ought not to be free at all; but, *prima facie*, he is to give up everything he has, and on that he is to be free. Now what is the position of the bankrupt in this case? If I thought that there was any tangible expectation of his receiving a larger income than that which is necessary for his support in his position as an officer in the army, then I should see the propriety of suspending his discharge for a longer period, or even of making an order that he should set aside a portion of his income; but I see no reason for supposing that the two years' suspension will not answer the justice of the case, which period I think ought to run from February 26th, the date of the application by the Official Receiver.

STIRLING, L.J., and COZENS-HARDY, L.J., concurred.

Appeal allowed.

Solicitors: *Redpath, Marshall & Holdsworth*, for the Appellant.

J. E. Lickfold, for the Respondent.



IN RE ROWE, EX PARTE DERENBURG & CO.

1904, April 29. C. A. VAUGHAN WILLIAMS, STIRLING AND
COZENS-HARDY, L.JJ.

*Bankruptcy—Proof—Voluntary Payment to Creditor by Stranger—Withdrawal—
Substitution of Fresh Proof—Bankruptcy Act, 1883, Sched. II. r. 22—Bank-
ruptcy Rules, 1886, rr. 225 to 229.*

A voluntary payment by a stranger to a creditor in respect of a loss occasioned by the debtor is not a payment for which the creditor is bound to give credit in his proof.

Decision of BUCKLEY, J., affirmed.

Per BUCKLEY, J.: A creditor may withdraw his proof at any time before the trustee in bankruptcy has notified that he has admitted or rejected it.

THIS was an appeal from the rejection of a proof by the trustee in bankruptcy.

The appellants Derenburg & Co. were stockbrokers who had had dealings with the bankrupt, and at the date of the receiving order in January, 1903, the bankrupt owed them 20,368*l.*, which they had lent to him on the security of share certificates, which turned out to have been forged. Messrs. Bewick, Moreing & Co., of whose firm the bankrupt had been a member, while not admitting any liability in respect of the bankrupt's fraudulent acts, sent to the appellants in June, 1903, a cheque for 6,500*l.* as a voluntary payment in respect of the losses they had sustained by Rowe's criminal acts. The appellants sent in their first proof in July, 1903, claiming 13,868*l.*, and giving credit for the 6,500*l.* paid to them by Bewick, Moreing & Co. Some correspondence relating to the proof ensued between the appellants and the trustee in bankruptcy, but the proof had not been formally admitted by 5 November, 1903, when the appellants presented a second proof in substitution for the first claiming the total sum of 20,368*l.* This proof was presented by the appellants in consequence of their having been advised that Bewick, Moreing & Co. could not put in any proof for the 6,500*l.* paid by them, and that they themselves were entitled to prove for the whole amount of the money lent.

In December, 1903, the trustee admitted the first proof for 13,868*l.* and subsequently rejected the second proof, giving as reasons for his rejection—first, that the creditors were not entitled to withdraw their first proof and substitute another without the

leave of the Court; and secondly, that they were bound to give credit for the 6,500*l.* paid by Bewick, Moreing & Co.

Derenburg & Co. appealed.

The appeal was held before BUCKLEY, J., on 29 February, 1904.

H. Reed, K.C., and *G. L. Bannerman*, for the appellants:

A proof may be withdrawn at any time before it is adjudicated upon for the purposes of dividend: Bankruptcy Rules, 1896, r. 229; *In re Rhoades, Ex parte Rhoades* [1899] (1), and *In re Clark, Ex parte Buenos Ayres and Pacific Railway* [1901] (2). Payment by a third party without authority is inoperative to discharge the debtor. In order to discharge the debt the payment must be made at the debtor's request or be ratified by him: *Leake on Contracts* (4th ed.), p. 647; *Jones v. Broadhurst* [1850] (3); *Goodwin v. Cremer* [1852] (4); *Kemp v. Balls* [1854] (5); *James v. Isaacs* [1852] (6), and *Lucas v. Wilkinson* [1856] (7).

Muir Mackenzie, for the trustee:

The circumstances and correspondence show that the 6,500*l.* was received by the appellants as part payment of the debt. When a proof has been lodged, and the trustee does not give notice rejecting it, the creditor cannot withdraw it without the consent of the Court. The principle of withdrawing proofs is shown by *In re Safety Explosives, Limited* [1908] (8), and also by *In re Dodds, Ex parte Vaughan's Executors* [1890] (9), which is an authority for saying that if the trustee does not deal with the proof within twenty-one days he must be taken to have admitted it: *In re Deerpurst, Ex parte Seaton* [1891] (10). A payment on account of

(1) 6 *Manson*, 277; [1899] 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 47 W. R. 561.

(2) 8 *Manson*, 136; [1901] 1 K. B. 655; 70 L. J. K. B. 269; 84 L. T. 208; 49 W. R. 528.

(3) 9 C. B. 173.

(4) 18 Q. B. 757; 22 L. J. Q. B. 30; 17 Jur. 2.

(5) 10 Ex. 607; 24 L. J. Ex. 47.

(6) 12 C. B. 791; 22 L. J. C. P. 73; 1 W. R. 21; 17 Jur. 69.

(7) 1 H. & N. 420; 26 L. J. Ex. 13.

(8) 11 *Manson*, 76; [1904] 1 Ch. 226; 73 L. J. Ch. 184.

(9) 25 Q. B. D. 529; 59 L. J. Q. B. 403.

(10) 8 *Morr*. 258.

loss is the same thing as a payment in respect of debt: *In re Rogers, Ex parte Holland* [1891] (11).

BUCKLEY, J.: This application must succeed. The applicants carried in proof for 13,868*l.*, which sum was arrived at by deducting from the original debt the sum of 6,500*l.* stated to be cash received from Bewick, Moreing & Co., in which firm the bankrupt was a partner. After the proof was sent in there was some correspondence relating to the proof between the appellants and the trustee in bankruptcy, but nothing further was done by the trustee until December, when the proof was admitted. In the interval—that is, on 5 November—the appellants sent in an amended proof not deducting the 6,500*l.*

The first point taken by the trustee is that the first proof must be taken to have been admitted under rule 228 after the time there mentioned had expired. I do not think so. Rule 229 contemplates that some notification of admission will be given by the trustee. The applicants were entitled to present a fresh proof without leave, because at the time when they did so the first proof had not been admitted, nor had the trustee given any intimation that he intended to admit it.

The second point which I have to consider is whether the second proof was rightly made. The correspondence shows the circumstances under which the 6,500*l.* was paid. It shows that Bewick, Moreing & Co., disputing any liability, paid the money not in respect of a liability, but in consideration of the fact that loss had been sustained through the acts of a person for whom they considered themselves in some way morally responsible. In these circumstances the point raised in *Kemp v. Balls* (5) and some of the other cases cited does not arise. This is not a case where a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communication with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person through whom Bewick, Moreing & Co.

held themselves to be on some moral ground, at any rate not upon any legal ground, responsible. The rejection of the proof on the grounds stated was therefore wrong, and the proof must be admitted for the full amount of the debt.

The trustee appealed.

The only question argued on the appeal was whether the respondents were bound to give credit for the 6,500*l*.

Gore-Browne, K.C., Muir Mackenzie, and P. M. Francke, for the appellant, on this point referred to *Jones v. Broadhurst* (8); *Belshaw v. Bush* [1851] (12); *Walter v. James* [1871] (13); *Cook v. Lister* [1869] (14); *Simpson v. Eggington* [1854] (15); *Kemp v. Balls* (5); *Keighley, Maxsted & Co. v. Durant* [1901] (16), and *Leake on Contracts* (4th ed.), p. 847.

H. Reed, K.C., and F. C. Willis, for *Derenburg & Co.*, were not called on.

VAUGHAN WILLIAMS, L.J.: In my opinion the judgment of Mr. Justice BUCKLEY was perfectly right. He finds what are the facts of the case, and says—I think quite justly, if we take the view of the facts which he has taken—that the point of law does not arise; that is to say, no question arises here as to the soundness of the *dictum* of Mr. Justice WILLES in *Cook v. Lister* (14), nor any such question as was raised in *Belshaw v. Bush* (12).

In my opinion, that conclusion of fact arrived at by Mr. Justice BUCKLEY as to the payment made by Bewick, Moreing & Co. is plainly right. As the learned Judge points out, it was a payment with which the bankrupt had nothing to do, and of which he was ignorant. It did not purport to be made on his behalf, nor on account of either the debt or the debtor. It was a voluntary gift made by Messrs. Bewick, Moreing & Co. for the purpose of mitigating losses for which they were not responsible, and neither party

(12) 11 C. B. 191; 22 L. J. C. P. 24; 17 Jur. 67.

(13) L. R. 6 Ex. 124; 40 L. J. Ex. 104; 24 L. T. 188; 19 W. R. 472.

(14) 13 C. B. (N.S.) 543, 549; 32 L. J. C. P. 121, 126; 7 L. T. 715; 11 W. R. 369.

(15) 10 Ex. 845; 24 L. J. Ex. 312.

(16) [1901] A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777.

184 IN RE ROWE, EX PARTE DERENBURG & CO. [MANSON,

intended the payment to be made or accepted on account of the debtor or of the debt.

STIRLING, L.J. : I agree.

COZENS-HARDY, L.J. : I agree. The point of law which has been argued really does not arise in the view which I take of the facts.

Appeal dismissed.

Solicitors : *Morley, Shirreff & Co.*, for the Appellant, the Trustee.
C. W. Dunn, for the Respondents.

IN RE JOHN ROBERTS & CO., EX PARTE BONZOLINE
MANUFACTURING CO.

1904, April 30. C. A. VAUGHAN WILLIAMS, STIRLING AND COZENS-
HARDY, L.JJ.

*Bankruptcy—Discharge—Consent to Judgment—Payable by Annual Instalments—
Modifications—Bankruptcy Act, 1890, s. 8, sub-s. 2—Bankruptcy Rules, 1886
and 1890, r. 244.*

An application to the Court after the expiration of two years from the date of an order of discharge under the Bankruptcy Act, 1883, s. 28, sub-s. 2, to modify the terms of the order, should be made by the bankrupt, and not by the trustee.

The bankrupt is not disqualified from making such an application by the mere fact that he has failed to comply with the requirements of Rule 244 of the Bankruptcy Rules, 1886 and 1890, requiring him to render accounts of his after-acquired property.

The Court will modify the terms of the order for the bankrupt's discharge where on the evidence there is no reasonable probability of his being in a condition to comply with the terms of the order originally made.

THIS was an appeal by a creditor against an order of Mr. Registrar Linklater.

John Roberts, a professional billiard-player, was adjudicated a bankrupt on 7 April, 1898.

On 11 April, 1900, he obtained an order of discharge, which contained a recital to the effect that the facts mentioned in paragraphs

(a), (b), (c), (i), and (k) of sub-section 3 of section 8 of the Bankruptcy Act, 1890, had been proved, and ordered that the bankrupt be discharged subject to the following condition to be fulfilled before his discharge took effect—namely, that he should before the signing of this order consent to judgment being entered against him in the Queen's Bench Division by the trustee for the sum of 1,500*l.*, being part of the balance of the debts provable in the bankruptcy, which was not satisfied at the date of this order, and 1*l.* 10*s.* costs of judgment; and it was further ordered that such judgment be satisfied by annual payments of 300*l.*, the first year to end on 1 June, 1901; and it was further ordered that upon the required consent being given judgment might be entered against the bankrupt in the Queen's Bench Division for 1,500*l.*, together with 1*l.* 10*s.* for the costs of judgment. The bankrupt gave the required consent, and judgment was entered by the trustee accordingly.

The earnings of the bankrupt, who went on professional tours in India and the colonies, had fallen short of expectations, and only one instalment of 300*l.* had been paid. The bankrupt's brother-in-law had recently made an offer to pay 500*l.* in satisfaction of the 1,200*l.* remaining due under the judgment, and on 19 February, 1904, at a meeting of creditors convened by the trustee, it was resolved that, subject to the consent of the Court, the offer be accepted. The trustee then applied to the Court to sanction the acceptance by him of the offer.

In support of the application the trustee made an affidavit, in which he said that, so far as he had been able to ascertain, the bankrupt during his absence from England had not been able to earn sufficient to enable him to discharge his obligations under the judgment, and that he considered that it would be to the advantage of the creditors that the offer should be accepted. An affidavit in support of the application was also made by the bankrupt's wife. The bankrupt himself was in India.

The Bankruptcy Act, 1890, s. 8, sub-s. 2, contains a proviso: "Provided that if at any time after the expiration of two years from the date of any order made under this section the bankrupt shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such

manner and upon such conditions as it may think fit." It appeared that the bankrupt had not within the first year filed the statement required by rule 244 of the Bankruptcy Rules, 1886 to 1890, of property or income acquired by him subsequent to his discharge, but in July, 1902, he filed an affidavit giving an account of his receipts and expenditure during the two years ending 1 June, 1902.

The Registrar thought that under the proviso in section 8, subsection 2, the application to modify the order ought to have been made by the bankrupt himself, but that he was at liberty to treat the present application as one made by the bankrupt, and on that footing made the order now appealed from—namely, that the terms of discharge be modified, and that the balance outstanding on the judgment be satisfied by payment of 500*l.* to the trustee within ten days, and that upon payment the trustee should cause satisfaction to be entered to the judgment.

An opposing creditor appealed.

Ringwood, for the appellant :

The burthen of showing that there is no reasonable probability of complying with the order lies on the bankrupt, and the application ought to be made by the bankrupt himself: Bankruptcy Act 1890, s. 8, the express provision in which controls section 104 of the Bankruptcy Act, 1883. The bankrupt is in default under rule 244, and the application ought not now to be treated as one by the bankrupt. In any case no sufficient reason has been shown for modifying the terms on which the discharge was granted.

Muir Mackenzie, for the bankrupt :

The Registrar considered that the application might be treated as if made by the bankrupt, and the technical objection on this ground fails. The bankrupt has substantially complied with the requirements of rule 244 by the affidavit which he filed in July, 1902, and non-compliance with any rule does not render any proceeding void or prevent the bankrupt from making this application: Bankruptcy Rules, r. 350. *In re Durnford* [1895] (1), shows the policy of the law is to grant a discharge in such a case, and that was a decision under the Bankruptcy Act, 1883, s. 28, which

(1) 2 Manson, 521.

did not contain a similar proviso to that found in sub-section 2 of section 8 of the Act of 1890.

E. T. Holloway appeared for the trustee, but the Court refused to hear him on the ground that he had no *locus standi*.

Ringwood replied.

VAUGHAN WILLIAMS, L.J. : In my opinion we ought not to interfere with the discretion of the Registrar. Section 28 of the Bankruptcy Act, 1883, as I understand it, treated the conditions imposed in an order of discharge entirely as a punishment to which the bankrupt was liable by reason of his personal conduct or his conduct of his affairs. The matter has now been dealt with by section 8 of the Bankruptcy Act, 1890, which has been substituted for section 28. [His Lordship read sub-section 2 of section 8, and continued :] It seems to me that when such an application as the present one comes before the Court, the Court has already discharged its primary function in limiting the order of discharge with reference to the conduct of the bankrupt; and the first thing which the Court has to consider upon the application is whether there is "no reasonable probability" of the bankrupt's being able to comply with the terms of the order. I do not think the Court is entitled to review the conduct of the bankrupt in not exactly complying with the provisions of the Rules; but though he has undoubtedly made default in not rendering the prescribed accounts, the Court is still at liberty to consider whether there is a reasonable probability of the bankrupt's performing the conditions of the order of discharge. After all, those conditions are intended for the benefit of the creditors, and the Court ought not to leave that out of consideration. In my judgment, the evidence makes it very doubtful whether this bankrupt at his time of life, and having regard to his comparative want of success in his tour in the East, will find his billiard-playing in years to come so good a source of income as it has been in the past. That is the inference which I draw from the evidence, and I think it is really in the interest of the creditors that this offer of 500*l.* should be accepted; and in my opinion we ought to affirm the order of the Registrar.

STIRLING, L.J.: I have come to the same conclusion. The Registrar has already exercised his judicial discretion in granting an order of discharge subject to the condition that the bankrupt shall consent to judgment being entered up against him for 1,500*l.*, to be paid in five annual instalments—of course, out of his future earnings. The bankrupt was also subject to the provision of rule 244 as to rendering accounts of his property. The present application may, I think, be properly treated as made by the bankrupt under the proviso at the end of sub-section 2 of section 8 of the Bankruptcy Act, 1890, for relief from the conditions imposed by the order of discharge. The bankrupt has already paid the first instalment of 300*l.*, and a proposal has now been made by his brother-in-law to pay 500*l.* to the trustee in satisfaction of the 1,200*l.* which remains due upon the judgment, and the creditors have seen fit to pass a resolution in favour of accepting the offer. The only question is whether, the bankrupt not having complied with rule 244, the Court ought to ratify the decision of the creditors. The only thing which the Court has to consider under the proviso is whether there is “no reasonable probability” of the bankrupt’s being able to comply with the terms of the order. There is evidence that the creditors (with one exception) think the proposal a favourable one. No doubt the dissentient creditor has a substantial interest in the matter; but still the majority approve of accepting the offer. The matter has been fully considered by the Registrar, and I think this Court should be very loth to depart from his decision.

COZENS-HARDY, L.J.: I am of the same opinion. I think that this was really an application by the bankrupt. It is not an ordinary application; the case is a very special one. It was clearly contemplated by all the parties that the bankrupt should go on a tour in Australia and elsewhere with a view of earning money by his skill as a billiard-player. There has been no such wilful disobedience by him to the conditions of the order of discharge as should induce the Court to refuse the application, if, apart from the conduct of the bankrupt, the Court is satisfied that there is no reasonable probability of his being in a position to comply with the terms of the order. I think the evidence is all one way, and I am

not prepared to differ from the conclusion of the Registrar. I think his order should be affirmed.

VAUGHAN WILLIAMS, L.J.: There will be no costs of the appeal. We think that under the circumstances it was reasonable to raise the question. But it was wholly unnecessary for the trustee to appear on the appeal, and no deduction for his costs of the appeal must be made from the 500*l*.

Solicitors: *Pownall & Co.*; *Letts Brothers*; *Roscoe & Hincks*.

REX *v.* HUMPHRIS.

1904, March 12, 80. C. C. R.(1).

Bankruptcy—Fraudulent Debtor—Assignment for Benefit of Creditors—Quitting England with Property divisible among Creditors—"His Property"—Debtors Act, 1869, s. 12.

A debtor executed a deed of assignment for the benefit of his creditors, whereby he conveyed and assigned all his property, including sums of money, to a trustee upon trust to sell, and out of the money coming to his hands by the ways and means aforesaid to pay himself the cost of carrying the deed into effect, and then to distribute the same among the creditors of the debtor as therein provided. The deed was executed by the debtor and by the trustee, but was not executed by or communicated to any of the creditors. Except a sum of 161*l*., which the debtor had in his possession at the date of the deed and which he retained, the trustee took possession of the debtor's effects and carried on his business. Soon afterwards the debtor quitted England, taking with him 120*l*., part of the sum of 161*l*.. Within four months afterwards he was adjudicated a bankrupt:

Held, that the 120*l*. was "part of his property" which ought by law to be divided amongst his creditors within the meaning of section 12 of the Debtors Act, 1869, and that he was rightly convicted of a felony under that section.

Reg. v. Creese (2) distinguished.

CASE reserved by the Recorder of Banbury.

The prisoner was tried at the Quarter Sessions for the Borough of Banbury on 19 January, 1904, on an indictment charging him

(1) *Coram*, Lord Alverstone, C.J., and Grantham, Bruce, Darling, and Channell, JJ.

(2) L. R. 2 C. C. R. 105; 43 L. J. M. C. 51; 29 L. T. 897; 22 W. R. 375; 12 Cox, C. C. 539.

with a felony under section 12 of the Debtors' Act, 1869 (3), for having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of 20*l.* or upwards—that is to say, a sum of 120*l.*, which ought by law to be divided among his creditors.

The following facts were proved :

The prisoner, Joseph Humphris, carried on the business of a hay and coal merchant at Castle Wharf, in the borough of Banbury. On 24 April, 1903, being in pecuniary difficulties, he executed a deed of assignment of all his property for the benefit of his creditors.

The deed of assignment was dated 24 April, 1903, and made between the prisoner (therein called the debtor) of the first part, William Booth of Banbury, in the county of Oxford, auctioneer (therein called the trustee) of the second part, and the several persons and firms whose names and seals should be thereunto subscribed and set being respectively creditors of the debtor, of the third part. After reciting that the debtor, being justly and truly indebted unto the parties thereto of the third part in the several sums set opposite to their respective names in the schedule thereto, and being unable to pay the same in full, had agreed to convey and assign all his property and effects unto the trustees for the benefit of his creditors as thereafter mentioned, the deed witnessed that in pursuance of such agreement and in consideration of the premises the debtor, as beneficial owner, thereby granted and conveyed unto the trustee all and every the freehold and leasehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, of or belonging to the debtor to hold the same unto and to the use of the trustee according to the

(3) The Debtors Act, 1869, s. 12: "If any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for

quitting England and for taking with him, any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour."

several tenures thereof, upon the trusts thereafter contained and declared concerning the personal estate of the debtor. And it further witnessed that for the consideration aforesaid the debtor as beneficial owner did by those presents assign and transfer unto the trustee all and every the stock in trade, goods, chattels, wares, merchandises, book and other debts, sum and sums of money, and all securities for money, and all other the personal estate and effects whatsoever and wheresoever of him the debtor to hold the same unto the trustee upon the following trusts—that is to say, upon trust that the trustee should forthwith sell and dispose of the same either by public auction or private contract, and either together or in lots with power to make any stipulations as to title or evidence of title which to the trustee should seem necessary, and to buy in and resell the same and to give any creditor for the same or to take any security for the purchase-money or any part thereof without being answerable for any losses arising thereby, and to receive all book and other debts and securities, and sell and convert into money all the rest and residue of the estate of the debtor, with power to the trustee to accept any composition for any debts or moneys owing to the debtor, and to allow time for the payment of the same, and generally upon such terms and conditions, at such times and in such manner in every respect as to the trustee should seem proper and for the benefit of the estate, and out of the money which should come to his hands by the ways and means aforesaid in the first place to pay himself the costs and expenses of such sales, calling in, and conversion, the costs, charges, and expenses of and incidental to the carrying those presents into effect (including a fair and reasonable remuneration to the trustee for his services in carrying the same into effect), and all other expenses attending or relating to the trusts thereby created, and in the next place to pay all claims which were by law entitled to be paid in full and in priority to other debts in case of bankruptcy, and upon further trust to pay and divide the clear residue of the said moneys into and among all the creditors of the said debtor rateably and in proportion to the amount of their respective debts, but subject nevertheless to the provisions thereafter contained. And it was thereby declared that it should be lawful for the trustee to employ any person or persons in winding up the affairs of the debtor, and

in collecting and getting in and disposing of the estate effects, and premises thereinbefore expressed to be thereby granted and assigned or any part thereof, or otherwise in or about the premises, and to make any remuneration therefor out of the trust estate to the person or persons so to be employed as aforesaid as the trustee should in his discretion think fit, provided that nothing therein contained should prejudice any right or remedy which any creditor might have against any other person than the debtor, nor prejudice or affect any mortgage, lien, or security which any creditor might have in any property or effects of the debtor or of any other person, but that a creditor holding any such mortgage, lien, or security should be entitled to receive dividends as aforesaid in respect of the amount of the debt owing to him after realising or giving credit for the value of such mortgage, lien, or security in like manner as he would have had to realise or give credit for the same in order to obtain a dividend in case of bankruptcy. It was also provided by the said deed that the provisions contained in sections 31 to 38 inclusive of the Conveyancing and Law of Property Act, 1881, should be applicable thereto, and be deemed to be incorporated therein. And it was further witnessed that, in consideration of the conveyance and assignment thereinbefore contained, he, the trustee, and the several persons and firms parties thereto of the third part did thereby respectively remise, release, and for ever discharge the debtor and his estate and effects from all and singular the debts, bills, bonds, notes, accounts, costs, damages, expenses, judgments, executions, actions, claims, and demands whatsoever which they the said several persons, parties thereto of the third part, respectively then had, or should or might thereafter have, claim, or demand of, from, or against the debtor or his estate or effects, or either of them, respectively, on account of the debts and securities due or owing from the debtor, and all interest for or in respect of the same, or for or on account of any other thing relating thereto; provided always, and it was thereby expressly declared and agreed that in case a receiving order should be made against the said debtor within three calendar months of those presents then the release thereinbefore contained should be void and of no effect.

The said deed was executed by the prisoner and by the said

William Booth, the trustee, on 24 April, but was never executed by any creditor, nor was the name of any creditor or the amount of any debt ever inserted in the schedule to the said deed.

On 24 April, 1903, before and at the time when the prisoner executed the said deed, he had in his possession the sum of 161*l.* in cash, being moneys due to him which he had collected from various debtors, the whole of which sum he retained, instead of handing the same over to the trustee.

On 25 April, 1903, the said William Booth, as such trustee as aforesaid, took possession of the prisoner's business premises and effects at Castle Wharf aforesaid, and continued the business until the appointment of the Official Receiver under the bankruptcy hereinafter mentioned.

On 27 April, 1903, the before-mentioned deed was registered under the Deeds of Arrangement Act, 1887.

On 28 April, 1903, the prisoner absconded from and quitted England, and went to Canada taking with him the sum of 120*l.*, part and parcel of the aforesaid sum of 161*l.*, of which he was possessed on 24 April, 1903, and had kept as aforesaid. The prisoner had spent the remaining sum of 41*l.*, other parcel of the said sum of 161*l.*, for his own purposes between 24 and 28 April, 1903.

On 30 April, 1903, a bankruptcy petition was presented against the prisoner. A receiving order was thereupon made on 13 May, 1903, and on 18 May, 1903, the prisoner was adjudicated a bankrupt.

There was no evidence before the Recorder that any creditor knew of the prisoner's intention to execute the said deed, or that any creditor had ever in any way assented thereto, or that any creditor ever knew of its existence, or that the said trustee had done anything under the deed beyond taking possession of the prisoner's property and effects and carrying on the business at Castle Wharf aforesaid.

At the close of the prosecution it was submitted by counsel on behalf of the prisoner that there was no case to go to the jury, because on the evidence the said sum of 120*l.* so taken away by the prisoner on his quitting England as aforesaid was, under and by virtue of the said deed, the property of the trustee, and not the property of the prisoner at all, and therefore on the authority of *Reg. v. Creese* [1874] (2), the case was not within section 12 of the Debtors Act, 1869.

The Recorder, however, declined to withdraw the case from the jury, but consented to reserve the point.

The jury returned a verdict of Guilty, and the Recorder sentenced the prisoner to six months' imprisonment in the second division, but released him on bail pending the decision of this Court.

The question for the opinion of the Court was whether the sum of 120*l.* so taken away by the prisoner when he quitted England as aforesaid on 28 April, 1903, was "his," that is, the prisoner's, property within the meaning of section 12 of the Debtors Act, 1869.

Vachell, for the prisoner :

This case is covered by *Reg. v. Creese* (2). All the debtor's property, including the 120*l.*, passed by the deed of assignment to the trustee for the creditors. It was no longer the prisoner's property, unless the words "his property" in section 12 can be held to include property which has been his, and though not his now, remains divisible among his creditors. But that cannot be held without overruling *Reg. v. Creese* (2). This deed is not revocable, because the trustee takes an interest under it, being empowered to pay himself the costs, charges, and expenses of, and incidental to the carrying the deed into effect: he is more, therefore, than a mere mandatory: *Siggers v. Evans* [1855] (4) and *Johns v. James* [1878] (5).

H. Sutton, for the Crown :

In *Reg. v. Creese* (2) the creditors were parties to the deed. In the present case the deed was not communicated to any creditor. The trustee was therefore a mere mandatory, whose mandate might be revoked: *Garrard v. Lord Lauderdale* [1830] (6); *Acton v. Woodgate* [1838] (7), recognised in the Courts of Common Law in *Smith v. Keating* [1848] (8), and *Harland v. Binks* [1850] (9); and *quoad* this 120*l.*, it was revoked by the prisoner retaining possession of the money, which was consequently his property—if,

(4) 5 E. & B. 367; 24 L. J. Q. B. 305.

(5) 8 Ch. D. 744; 47 L. J. Ch. 853.

(6) 3 Sim. 1.

(7) 2 Myl. & K. 492; 3 L. J. Ch. 83.

(8) 6 C. B. 136.

(9) 15 Q. B. 713; 20 L. J. Q. B. 126.

indeed, it ever passed to the trustee at all. Money is the property of the possessor for the time being, and never having left the prisoner's possession it remained his property notwithstanding the deed.

Vachell, in reply :

The right to money may be passed by the deed (10).

Cur. adv. vult.

March 30.

The written judgment of Lord ALVERSTONE, C.J., GRANTHAM, J., DARLING, J., and CHANNELL, J., was delivered by

LORD ALVERSTONE, C.J.: This was a case stated by the Recorder of Banbury, on the conviction before him of the prisoner on a charge under section 12 of the Debtors Act, 1869, of having within four months next before the presentation of a bankruptcy petition against him quitted England and taken with him a part of his property to the amount of 20*l.* and upwards, that is to say, a sum of 120*l.*, which ought by law to be divided amongst his creditors. The prisoner was proved to have so quitted England, taking with him 120*l.* but he had shortly before going executed a deed of assignment of all his estate to a trustee for the benefit of his creditors, and it was contended on his behalf, on the authority of *Reg. v. Creese* (2), that the 120*l.* was not "part of his property" within the meaning of the section. That case is undoubtedly somewhat similar to the present, and we have to consider whether it is distinguishable. There the charge was preferred under sub-section 5 of section 11 of the Debtors Act, 1869, for fraudulently removing "any part of his property;" and it is impossible, we think, to put any different meaning on the words "any part of his property," in section 12, to that which they bear in section 11, sub-section 5. But for the doubt created by the decision in *Reg. v. Creese* (2), we should certainly have held that "his property, which ought to be divided amongst his

(10) "If one give or grant to another *omnia bona*, or all his goods: by this [these terms] do pass all his moveable and immoveable personal and real goods, as horses and other beasts; plate, jewels, and household stuff; bows; weapons, and such like; and his money . . ." *Shep. Touch.* ch. 5, "Exposition of Deeds" (Preston's ed.), p. 97.—Note by Reporter.

creditors," in the section in question, included property which had been his, which remained in his possession, and the title to which so far as parted with at all, had only been parted with by him in such a way as to leave it still divisible amongst his creditors in the event of bankruptcy. The concluding words of the section "unless the jury is satisfied there was no intention to defraud" would be sufficient to protect the accused where he had acted innocently and not in contemplation of bankruptcy. We have, however, to see whether, if so held, it would be contrary to anything really decided in *Reg. v. Creese* (2), and for that purpose we have to consider the facts of that case and this. In *Reg. v. Creese* (2) the assignment of 21 December, 1872, had been acted upon, and was undoubtedly a genuine transaction; further advances were made upon it. Creese entered into the service of Lakin and White, the trustees under the deed, pursuant to the terms of it, and for several months continued to act as the agent and bailiff of the trustees. The bankruptcy of Creese did not take place till 17 October, 1873, nearly a year after the date of the deed, and the removal, which was the alleged offence under section 11, sub-section 5, took place between 14 and 16 October, 1873. The only ground on which the title of the trustees of the deed failed was that the deed of December, 1872, was not registered as a bill of sale. It seems to us, therefore, that the Court was right in holding that at the date of the alleged fraud the property really belonged to the trustees, and not to Creese. We agree, therefore, that *Reg. v. Creese* (2) was rightly decided, the facts of that case being as stated; but if the reasoning of the Court lays down any general rule which would exempt the defendant in this case from responsibility, we do not agree with it.

The facts in this case appear to be different. Except by the trustee taking possession of the stock and effects the deed does not appear to have been ever acted upon. The 120*l.* with which the prisoner absconded was, no doubt, money which the trustee under the deed might have claimed from him by virtue of the assignment; but he never did get it as the trustees of the deed in *Reg. v. Creese* (2) got the stock which Creese misappropriated, and at most the trustee here had a mere paper title. Nothing took place that would make this money, which the defendant was obviously keeping back

from his creditors, and which he had in his actual possession and was not holding for the trustee, in any real sense the property of the trustee under the deed executed three days before the absconding. We do not adopt the view that the deed was revocable so far as regards the property of which the trustee under it got possession, for he had an interest in it. Lord Justice JAMES in *Johns v. James* (5) says: "You cannot revoke the deed, and cannot get the property out of the hands of the trustee until, at all events, you have satisfied all the charges and expenses he has incurred, and any right he has acquired in the property. It is not a revocation of the deed, but it is a revocation of the directions given by the deed to the assignor's agent as to what he shall do with the proceeds." The deed, therefore, was not revocable; but, as to the money of which the trustee never got possession, no irrevocable trust appears to have been created.

We think that the Recorder was right in leaving the case to the jury, and on the facts the 120*l.* was, when taken away by the prisoner, his property, which ought by law to be divided amongst his creditors; and that any claim which the trustee under the deed might have to have the money handed over to him is not sufficient to prevent the operation of section 12 of the Debtors Act, 1869. The conviction must be affirmed and the defendant must be ordered to serve the remainder of his sentence.

BRUCE, J., read the following judgment: I agree that the conviction must be affirmed. But I wish to add that I think the facts in *Reg. v. Creese* (2) were very different from the facts in the present case. In this case the deed of assignment was a voluntary deed executed by the debtor for the benefit of his creditors, and was not communicated to them, and so was revocable by him except in so far as the trustee had acquired an interest in the property assigned. But so long as there were proceeds to meet the claim of the trustee for his expenses in acting under the directions of the deed, the debtor was at liberty to revoke the mandate contained in the deed so far as it related to the residue of his property. I think there was no evidence whatever to show that the trustee had acquired any interest in the sum of 120*l.*, in question. When, on 28 April, the debtor appropriated the sum of 120*l.*, which had never

been in the possession of the trustee, he revoked the mandate to the trustee contained in the deed so far as it related to the 120*l*.

In the case of *Reg. v. Creese* (2) the deed was not a voluntary deed, for part of the consideration of the deed was a sum of 350*l*. paid by one of the trustees to the debtor. The deed, therefore, in that case was not a revocable deed, and the money which the prisoner appropriated he had received as the servant or bailiff of the trustees and the money was clearly the money of the trustees.

Conviction affirmed.

Solicitors: *Crowther Davies*, Leamington, for the Prisoner.

Treasury Solicitor, for the Crown.

IN RE BROWNE, EX PARTE MARTINGELL.

1904, February 29. BUCKLEY, J.

Bankruptcy—Proof—Gaming Debt—New Consideration—Gaming Act, 1892.

The debtor, being sued for a gambling debt of 800*l*., successfully pleaded the Gaming Act, 1892. Thereupon the creditor wrote to the committee of the debtor's club informing them of the fact, with the result that the debtor was not re-elected. The debtor then agreed to pay the creditor 100*l*. in cash and to give bills for 400*l*., in consideration of the creditor withdrawing his letter. Upon the debtor becoming bankrupt, the creditor proved for the amount of the bills then due, but the proof was rejected by the trustee:

Held, that the bills were given not for the gaming debt, but for a wholly new consideration, which was not illegal, and that therefore the proof was wrongly rejected.

THIS was an appeal by a creditor from the rejection of his proof by the trustee in bankruptcy.

The debtor and Martingell were members of a sporting club, by the rules of which the members had to be re-elected annually.

The appellant Martingell had acted as agent for the debtor in making bets with bookmakers, and had paid losses for Browne to the amount of 800*l*. In 1900 Martingell brought an action against the debtor to recover that sum, but the debtor successfully pleaded the Gaming Act, 1892, and the action was dismissed with costs. Thereupon Martingell wrote a letter to the committee of the club

complaining of the conduct of the debtor, and at the following annual election of members the debtor was not re-elected a member. The debtor then communicated with Martingell, and it was agreed between them that, in consideration of Martingell withdrawing his letter to the club committee, the debtor should give him 100*l.* in cash and accept four bills of 100*l.* each in his favour. Before all the bills had matured the debtor became bankrupt. Martingell carried in a proof for the amount due on the four bills, but it was rejected by the trustee on the ground that the bills had been given for an illegal consideration.

Martingell appealed.

H. Reed, K.C., and *H. Simmonds*, for the appellant :

The consideration for the bills was not the gambling debt, for that was put an end to altogether by the dismissal of the action, and could not be sued for again. There was an entirely new consideration—namely, the withdrawal of the letter. It cannot be contended that this was an illegal consideration, nor can it be contended that there was no consideration.

Muir Mackenzie, for the trustee :

It may be that the bankrupt would have no answer to this claim, but the trustee, as representing the other creditors, can go behind the judgment and inquire into the real consideration; and going behind the judgment, the consideration is not good as against other creditors: *In re Deerhurst, Ex parte Seaton* [1891] (1). This was a compromise of a betting claim, and the Court can go behind a compromise, even though not fraudulent: *In re Hawkins, Ex parte Troup* [1895] (2).

H. Reed, K.C., was not called upon to reply.

BUCKLEY, J. : In this case the trustee has rejected the appellant's proof on the ground that it was founded on an illegal consideration. The facts are these. The debtor owed the creditor in respect of

(1) 8 Morr. 97; 60 L. J. Q. B. 412, n.; 64 L. T. 273.

(2) 2 Manson, 14; [1895] 1 Q. B. 404; 64 L. J. Q. B. 373; 72 L. T. 41; 43 W. B. 306; 14 R. 44.

betting transactions some 800*l.* It was not a legal debt, but what is called a debt of honour. An action brought by the creditor to recover that 800*l.* was dismissed in 1892. That was a decision that there was no debt, and that matter was at an end. Subsequently, for a new consideration altogether—namely, the withdrawal by the appellant of a letter he had written to the committee of the bankrupt's club—the bankrupt agreed to pay to the appellant the sum of 100*l.* cash, and to give him four bills for 100*l.* each. That was an entirely new transaction. It was contended on behalf of the trustee that this was merely a further agreement to pay the gaming debt, and the case of *In re Deerhurst* (1) was cited in support; but that case is distinguishable from and, indeed, the contrary of the present, for the creditor there had obtained by default a judgment for a gaming debt which was bad, and the debtor had agreed, in consideration of the creditor not posting him as a defaulter, to treat the bad judgment as a good one. In the present case the question of the existence of any debt had been entirely put an end to. The bills were given for a new consideration altogether, and it could not be said that it was an illegal consideration. They were given not to pay the gaming debt, but, as ROMILLY, M.R., said in *Bubb v. Yelverton* [1870] (3), to avoid the consequences of not having paid it. The rejection of the proof must be set aside; but this must be without prejudice to any other objection which he may be advised to take.

Appeal allowed.

Solicitors: *J. J. Hands*, for the Appellant.

Andrew Wood, Purves & Sutton, for the Respondent.

(3) L. R. 9 Eq. 471; 39 L. J. Ch. 428; 22 L. T. 258; 18 W. R. 512.

LEA v. THURSBY.

1904, April 25, 26, 29. SWINFEN-EADY, J.

Bankruptcy—Disclaimer of Lease—Mortgage by Sub-demise—Vesting Order—Merger—County Court—Jurisdiction—Bankruptcy Act, 1883, s. 55, sub-s. 6; s. 102, sub-s. 1—Bankruptcy Act, 1890, s. 13.

A Court of Bankruptcy is entitled to exercise a judicial discretion, and does not merely act ministerially, in dealing with applications for vesting orders under the provisions of section 55, sub-section 6, of the Bankruptcy Act, 1883.

The lessee of certain freeholds mortgaged his term to the plaintiff by way of sub-demise to secure certain advances. He subsequently acquired the fee-simple of the premises, and ultimately sold it to the defendant. Afterwards the lessee became bankrupt, and his trustee duly disclaimed the lease under the provisions of section 55 of the Bankruptcy Act, 1883. The defendant thereupon moved the County Court in the bankruptcy, under the provisions of sub-section 6 of section 55, for an order that the mortgagee should take a vesting order of the lease; or that, on the failure of the mortgagee to take such vesting order, the mortgagee should be excluded from all security upon the lease, and that the lease should thereupon be vested in the defendant freed from all incumbrances. The mortgagee declined to accept a vesting order, on the ground that the lease had merged in the fee-simple on the conveyance of the fee-simple to the lessee, and that it was not, accordingly, any longer subsisting, and could not therefore be the subject of a vesting order. The Registrar decided on the particular facts of the case that the lease was still subsisting; and he made an order excluding the mortgagee from all security in the said lease, and vesting it in the defendant freed from all incumbrances. The mortgagee had not appealed from this order.

The mortgagee claimed in the present action that he was entitled to the incumbrance upon the lease created by his mortgage by way of sub-demise:

Held, that the County Court possessed jurisdiction under section 102, sub-section 1, of the Bankruptcy Act, 1883, to adjudicate upon the question of merger; that, the County Court having already so adjudicated, the question was now *res judicata*, and could not be re-opened, and that the mortgagee had accordingly lost his security.

Held, also, on the particular facts of the case, that there had been no merger.

TRIAL of action.

On 20 August, 1880, certain freehold premises at Bromsgrove, in the county of Worcester, were leased by Thomas Worthington to R. H. Milward for a term of ninety-five years from 25 March, 1880, at an annual rent of 222*l.* 5*s.* 6*d.*

On 24 June, 1881, these premises were sub-demised by R. H. Milward to James Woodfall for the above remainder of the term

created by the lease, less the last three days thereof, at a peppercorn rent, in order to secure certain advances which subsequently amounted to 8,000*l*.

On 27 March, 1882, the fee-simple of the premises in question was conveyed to R. H. Milward. This conveyance was expressed to be subject to the term for ninety-five years created as aforesaid on 20 August, 1880.

On 1 August, 1885, the premises were again conveyed in fee-simple to W. E. J. B. Farnham. This conveyance also was expressed to be subject to the term created on 20 August, 1880.

James Woodfall died on 17 October, 1887, and the plaintiffs were the present trustees of his will.

The defendant Thursby became entitled to the fee-simple of the premises in question as ultimate purchaser from W. E. J. B. Farnham, on 31 May, 1895.

On 8 July, 1902, a receiving order was made against R. H. Milward, and he was subsequently adjudicated bankrupt.

On 21 November, 1902, the trustee in the bankruptcy duly disclaimed the lease of 20 August, 1880, under the provisions of section 55 of the Bankruptcy Act, 1883.

On 23 December, 1902, the defendant Thursby served notice on the plaintiffs of his intention to apply by motion in the bankruptcy for an order that the plaintiffs should take an order vesting in them the property comprised in the lease of 20 August, 1880, subject (*inter alia*) to the rents and covenants of the said lease, or that they should be excluded from all interest in, and security upon, the said property; and that, failing such acceptance, the property comprised in the said lease should be vested in the defendant Thursby freed from all estates, incumbrances, and interests created therein by R. H. Milward. This application purported to be made by virtue of section 55, sub-section 6, of the Bankruptcy Act, 1883, as amended by section 13 of the Bankruptcy Act, 1890 (1).

(1) Bankruptcy Act, 1883, s. 55, sub-s. 6: "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing

such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same shall be delivered by way of compensation for such liability as aforesaid, or a trustee

The motion came on for hearing before the Registrar of the Warwickshire County Court, at Birmingham, on 30 January and 5 May, 1903. The plaintiffs then contended that the lease of 20 August, 1880, had merged in the fee-simple on the conveyance of 27 March, 1882, and that therefore there was no subsisting lease which could be vested in them. They further contended that they were entitled to the premises comprised in the said lease for the residue of the term created by the mortgage of 24 June, 1881, subject to the peppercorn rent reserved by the mortgage and to the equity of redemption subsisting thereunder.

The Registrar, however, decided that the lease of 20 August, 1880, had not merged on the conveyance of 27 March, 1882, but still subsisted, and could be the subject of a vesting order. And he thereupon ordered that the plaintiffs should be excluded from all interest in the said lease, and that the same should be vested in the defendant Thursby, freed from all estates, incumbrances and interests created therein by R. H. Milward, unless the plaintiffs should declare their option to accept a vesting order. This the plaintiffs had declined to do; and they had not appealed from the order of the Registrar.

for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

“Provided always, that when the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and

security upon the property. . . .”

Sub-section 7: “Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy.”

Bankruptcy Act, 1890, s. 13: “. . . The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-section six of [section fifty-five of the principal Act] so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order.”

The plaintiffs now asked (*inter alia*) in the present action for a declaration that they were entitled to the security created by the sub-demise by way of mortgage of 24 June, 1881.

Micklem, K.C., and W. C. Druce, for the plaintiffs :

We are not estopped by the judgment of the Registrar in the County Court from raising the question of merger. The Registrar had no authority to decide that question under section 102, sub-section 1, of the Bankruptcy Act, 1883 (2), except by the consent of the parties, for this is a question which does not arise out of the bankruptcy, and which might have been enforced, before the passing of the statute, by action in the High Court. It has been decided that, where "there are conflicting claims to any part of a bankrupt's property, between parties who are strangers to the bankruptcy, and in which the trustee in bankruptcy has no interest, the Court of Bankruptcy will decline to adjudicate upon the questions at issue": *In re Lowenthal, Ex parte Beesty* [1884] (3). The question, accordingly, is not *res judicata*.

[SWINFEN-EADY, J., referred to *Halliday v. Harris* [1874] (4).]

On the main question it is clear that merger had taken place at the date of the conveyance of 27 March, 1882: *Chambers v. Kingham* [1878] (5).

(2) Bankruptcy Act, 1883, s. 102, sub-s. 1: "Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete dis-

tribution of property in any such case.

"Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the Judge exceed in value two hundred pounds."

(3) 1 Morr. 117; 13 Q. B. D. 238; 53 L. J. Q. B. 524; 51 L. T. 431; 33 W. R. 138.

(4) L. R. 9 C. P. 668; 43 L. J. C. P. 350; 30 L. T. 680; 22 W. R. 756.

(5) 10 Ch. D. 743; 48 L. J. Ch. 169; 39 L. T. 472; 27 W. R. 289.

Haldane, K.C., and Wootten, for the defendant Thursby :

The question of merger is already *res judicata*, and the Registrar was entitled to decide the point under section 102, sub-section 1, of the Bankruptcy Act, 1883. The extent of the Registrar's jurisdiction under section 55, sub-section 6, of the Bankruptcy Act, 1883, has already been twice judicially examined : *In re Britton* [1889](6); *In re Smith, Ex parte Hepburn* [1890](7). There is nothing to limit the Registrar's jurisdiction in a matter like the present as in *Ellis v. Silber* [1872] (8).

Even if the plaintiffs were not precluded from now raising the question, yet on the merits of the case there has been no merger : *Theilsson v. Liddard* [1900] (9). The plaintiffs accordingly have lost their security by refusing to take a vesting order of the lease of 20 August, 1880, and by declining to appeal from the Registrar's order.

Cur. adv. vult.

April 29.

SWINFEN-EADY, J., after stating the facts : It is clear that, if the lease of 20 August, 1880, was a subsisting lease, and had not been merged or extinguished at the date of the bankruptcy, the defendant Thursby was entitled to apply to the Bankruptcy Court for a vesting order. This right is conferred by section 55 of the Bankruptcy Act, 1883 (1). It has been decided that, under this section, the landlord may apply that the mortgagee shall take a vesting order or be excluded from all interest in the disclaimed property : *In re Finley, Ex parte Clothworkers Co.* [1888](10), and *In re Baker, Ex parte Lupton* [1901](11). The Court to which this application was made was the only Court having jurisdiction in the matter—namely, the Birmingham County Court, in which the bankruptcy proceedings against Milward were then pending. Upon the hearing of this application the question arose whether the lease

(6) 6 Morr. 130; 61 L. T. 52; 37 W. R. 621.

(7) 7 Morr. 246; 25 Q. B. D. 536; 59 L. J. Q. B. 554; 63 L. T. 621; 38 W. R. 744.

(8) L. R. 8 Ch. 83; 42 L. J. Ch. 666; 28 L. T. 150; 21 W. R. 346.

(9) [1900] 2 Ch. 635; 69 L. J. Ch. 673; 82 L. T. 753; 49 W. R. 10.

(10) 5 Morr. 248; 21 Q. B. D. 475; 57 L. J. Q. B. 626; 60 L. T. 134; 37 W. R. 7.

(11) 8 Manson, 279; [1901] 2 K. B. 628; 70 L. J. K. B. 856; 85 L. T. 33; 49 W. R. 691.

of 20 August, 1880, was subsisting or had been merged. Upon the evidence before me it appears that the Court deemed it expedient or necessary to decide that question for the purpose of doing complete justice. The right of the applicant Thursby to apply for and obtain a vesting order (assuming always that the lease was subsisting at the date of the bankruptcy) was a right or claim arising out of the bankruptcy of Milward and the subsequent disclaimer by the trustee, and could only have been enforced by him in the Bankruptcy Court, and certainly could not, before the passing of the Bankruptcy Act, 1883, have been enforced by action in the High Court within the meaning of the proviso in section 102, sub-section 1, of the Bankruptcy Act, 1883, and the consent of all parties to the County Court exercising jurisdiction was not necessary. In my opinion the County Court in bankruptcy had full jurisdiction under section 102 of the Bankruptcy Act, 1883, to decide upon the claim of Thursby and all questions of law or fact arising thereon, including the question whether the lease of 20 August, 1880, was subsisting or had been merged by the conveyance in fee of 27 March, 1882.

It is common ground between the parties that the question whether there had been a merger of the lease, or whether it was subsisting at the date of the petition, was fully and elaborately argued before the Registrar. The first hearing was on 30 January, 1903; and upon its being represented to the Registrar that the case then pending, and since decided and reported—namely, *Capital and Counties Bank v. Rhodes* [1903] (12)—would probably affect the matter under consideration, he adjourned the further hearing until that case had been decided. After that case had been decided and reported, the adjourned hearing of the defendant Thursby's application took place—namely, on 5 May, 1903; and the Registrar then made the order of that date. The defendant Thursby then applied for, and obtained, an order for the payment of the costs of the application by the present plaintiffs, who had throughout resisted the motion.

Having regard to section 13 of the Bankruptcy Act, 1890, and to the cases of *In re Britton* (6) and *In re Smith, Ex parte Hepburn* (7),

(12) [1903] 1 Ch. 631, 652, 653; 72 L. J. Ch. 336, 343, 344; 88 L. T. 255; 51 W. R. 470.

it seems clear that the Court of Bankruptcy is exercising a judicial discretion, and not merely acting ministerially, in dealing with applications for vesting orders. The Bankruptcy Court has so dealt with the defendant Thursby's application on its merits, and has made an order, and has, in fact, decided that the lease has not merged. The plaintiffs deliberately determined not to appeal from this decision ; and, in my judgment, they are estopped by the proceedings in the Bankruptcy Court, and cannot have the merits tried over again in this Court.

I may add that, even if the plaintiffs were entitled to have the matter decided again on the merits, my judgment would be that the lease was subsisting at the date of the bankruptcy petition, and had not merged in the inheritance. The law as to merger is summed up by Lord Justice COZENS-HARDY in *Capital and Counties Bank v. Rhodes* (12). He says: "The Courts of Equity . . . had regard to the intention of the parties, and, in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place. . . . A Court of Equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold." Since the Judicature Acts, if there would have been no merger in equity, there is now no merger at law. In my opinion it was for the benefit of Milward that the term should not merge upon the conveyance of the freehold reversion. Such a merger would have fettered his own dealing with the property he had just bought. [His Lordship reviewed the facts, and continued :] The conclusion I have come to is that it was for the benefit of Milward, and that it was the intention of Milward, that the term should be kept alive.

The result is that the plaintiffs' claim fails, and substantial justice is done between the parties. The plaintiffs advanced 8,000*l.* on a leasehold interest, which (it now appears) is of no value ; and, having declined to accept the lease subject to rent and covenants, they now have no security for their money. But they could have had, if they had wished, the whole estate and interest of the bankrupt in the lease. They do not gain the windfall which

they hoped had fallen to their lot. On the other hand, the defendant Thursby, who bought the freehold free from incumbrance, does not suffer the injustice of having a first mortgage for 8,000*l.* charged upon the premises in priority to his interest. The action is dismissed with costs.

Solicitors: *Hadley & Dain*, for the Plaintiffs.

Robins, Hay, Waters & Hay, for the Defendant.

NEW BALKIS EERSTELING, LIMITED, v. RANDT
GOLD-MINING CO.

1904, March 25. H. L. (1).

Company—Shares—Call for whole Amount remaining Unpaid—Non-payment—Forfeiture—Sale—Condition that Purchaser be Discharged from Prior Calls—Subsequent Call—Liability of Purchaser—Companies Act, 1862, Table A, art. 22.

A limited company, having power to do so, forfeited shares for non-payment by the holders of a call for the full amount remaining unpaid thereon. The company then sold the shares to the appellants, the contract of sale providing that the shares were to be deemed discharged from all prior calls. Subsequently, the call on the former shareholders remaining unpaid by them, the company made a call on the appellants :

Held, that the contract of sale did not protect the appellants from liability for the subsequent call.

Article 22 of Table A in Schedule I. of the Companies Act, 1862, provides a mode by which a good title can be given to the purchaser of forfeited shares ; it preserves such purchaser from liability in respect of calls made prior to his purchase, but does not relieve him from liability in respect of money remaining due on the shares.

Decision of the Court of Appeal affirmed (2).

THIS was an appeal from an order of the Court of Appeal (EARL OF HALSBURY, L.C., Lord ALVERSTONE, C.J., and JEUNE, P.), which affirmed the decision of BUCKNILL, J.

The respondent company was incorporated on 5 July, 1895, under the Companies Acts, 1862 to 1890, as a company limited by shares, with a nominal capital of 80,000*l.* in 80,000 shares of 1*l.* each, which were subsequently by special resolution (passed on 24 July, 1895, and confirmed on 8 August, 1895) sub-divided into 320,000 shares of 5*s.* each.

The material articles of association of the respondent company provided as follows :

“ 8. The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them, and not by the conditions of allotment thereof made payable at fixed times, provided that no call shall exceed 25 per cent. of the nominal amount of the share, and that no call shall be made payable at a less interval than two calendar

(1) *Coram*, Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Lord Lindley.

(2) 10 *Manson*, 289.

months from the date fixed for the payment of a previous call, and each member shall pay the amount of every call so made on him to the persons, and at the time, or, if made payable by instalments, at the times and at the place appointed by the directors. A call may be made payable either in one sum or by two or more instalments."

" 11. If the sum payable in respect of any call or instalment is not paid on or before the day appointed for payment thereof, the holder for the time being of the shares in respect of which the call shall have been made or the instalments shall be due shall pay interest for the same at the rate of 10*l.* per cent. per annum from the day appointed for the payment thereof to the time of the actual payment. But the directors may, if they think fit, remit altogether or in part any sum becoming payable for interest under this clause."

" 13. If any member fail to pay any call or instalment on or before the day appointed for the payment of the same, the directors may at any time thereafter during such time as the call or instalment remains unpaid serve a notice on such member requiring him to pay the same, together with any interest that may have accrued and all expenses that may have been incurred by the company by reason of such non-payment."

" 15. If the requisitions of any such notice as aforesaid are not complied with, any shares in respect of which such notice has been given may at any time thereafter before payment of all calls or instalments, interest, and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect.

" 16. Any shares so forfeited shall be deemed to be the property of the company, and the directors may sell, re-allot, or otherwise dispose of, the same in such manner as they think fit.

" 17. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, instalments, interest, and expenses owing upon or in respect of such shares at the time of forfeiture, together with interest thereon, from the time of forfeiture until payment, at the rate of 10*l.* per cent. per annum, and the directors may enforce the payment of such moneys, or any part thereof, if they think fit, but shall not be under any obligation so to do.

"18. The directors may at any time before any shares so forfeited shall have been sold, reallocated, or otherwise disposed of, annul the forfeiture thereof upon such conditions as they think fit."

By section 15 of the Companies Act, 1862, in the case of a company limited by shares, in so far as the articles do not exclude or modify the regulations in Table A, those regulations shall, so far as the same are applicable, be deemed to be regulations of the company. The articles of the respondent company were not expressed to exclude or modify the regulations in Table A. Among the regulations in Table A is the following: "22. A statutory declaration in writing that a call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale."

At various dates previously to the month of May, 1900, a large number of the shares in the respondent company had been forfeited, and were available for sale. Among these were 40,000 shares held by the African Gold Properties, Limited, which had, in fact, been twice forfeited before the month of May, 1900, the first forfeiture having been annulled. In May, 1900, the appellants purchased 41,800 shares (including the above 40,000) from the respondent company for 150*l.* on the terms that "the whole amounts of the shares had been called up and were due before the forfeitures and the sale" to the appellants, and that the appellants were to be holders of the shares "free and discharged from all calls due prior to the purchase." These terms were embodied in the certificates which, on payment of the 150*l.* purchase-money, were issued by the respondent company to the appellants, who were duly registered as the holders of the 41,800 shares.

The certificate relating to the block of 40,000 shares was in the following form : " This is to certify that the New Balkis Eersteling, Limited, of Winchester House, Old Broad Street, London, E.C., is the registered holder of 40,000 shares of 5*s.* each . . . in the above-named company, upon which the sum of 3*s.* 4*d.* per share has been paid. The remaining 1*s.* 8*d.* per share has been called up, and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited, and the said New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares, discharged from all calls due prior to the date hereof." It was agreed before the Court of Appeal that the form of certificate was in fact copied from the wording of Article 22 of Table A set out above. The African Gold Properties had paid sums on the 40,000 shares representing approximately the difference between the call of 1*s.* 8*d.* per share and the call of 1*s.* 3*d.* per share, so that only 1*s.* 3*d.* remained unpaid on the shares.

On 12 December, 1900, the directors of the respondent company resolved that a call of 1*s.* 3*d.* per share be made on all the shares held by the applicants, and be payable on 3 January, 1901, and notice of the call duly given. The appellants refused to pay the amount called, and the present action was commenced in the King's Bench Division on 6 February, 1901, to recover that amount, with interest and costs.

BUCKNILL, J., ordered judgment to be entered for the respondent company. The Court of Appeal affirmed this decision (2).

Haldane, K. C., and C. C. Scott (A. T. Lawrence, K.C., with them), for the appellants :

This was not an issue, but a sale, of shares, and thus the decisions relied on by BUCKNILL, J., of *Ooregum Gold-Mining Co. v. Roper* [1892] (3) and *Welton v. Saffery* [1897] (4), that a company cannot issue its shares at a discount, are inapplicable. That a company may sell its shares at less than their nominal value is shown in

(3) [1892] A. C. 125; 61 L. J. Ch. 337; 66 L. T. 427; 41 W. R. 90.

(4) 4 Manson, 269; [1897] A. C. 299; 66 L. J. Ch. 362; 76 L. T. 505; 45 W. R. 508.

In re Exchange Banking Co., Ramwell's Case [1881] (5). The shares, having been forfeited, became the property of the respondents, who sold them freed from all liability for calls. Moreover, the respondents having called up the full amount from the African Gold Properties, had already exhausted their power of making calls. The respondents may still recover the amount now claimed from the African Gold Properties, and thus in effect, if they are successful, they will be paid twice over, and illegitimately increase their capital. The sale, freed, as the appellants contend it was freed, from all calls, was valid according to the Companies Act, 1862, s. 15, Table A, art. 22.

Sir R. T. Reid, K.C., and *Clauson*, for the respondents, were not heard.

LORD MACNAGHTEN: This case has been represented to your Lordships on the part of the appellants with great ability, but, speaking for myself, I rather doubt whether there is any room for argument.

The facts are quite clear. There was a company called the African Gold Properties, Limited, who were holders of shares in the Randt Co. They had 40,000 shares, upon which calls to the amount of 8s. 4d. per share were made and paid. Then there was a call to the amount of 1s. 8d. which was not paid, and the shares were forfeited. They were disposed of to the present appellants, and a certificate of proprietorship was granted to them.

It seems to me that the whole question depends upon the true construction of that certificate, bearing in mind, of course, that the certificate derived its efficacy from the general principles applicable to such a case as this, and the provisions of the enactment, especially in Table A of the Companies Act of 1862. The general principle in such a case is, I think, that every member of a company limited by shares is liable in respect of all moneys payable upon his shares to pay every call that is duly made upon him. It is contended by the appellants that the company had no power to make this call.

Now the certificate is in these terms: "This is to certify that the New Balkis Eersteling, Limited, is the registered holder of forty thousand shares of five shillings each" (then it sets out their

(5) 50 L. J. Ch. 827; 45 L. T. 531; 29 W. R. 882.

numbers), "upon which the sum of three shillings and fourpence per share has been paid." That, of course, means that 1s. 8d. per share has not been paid. Now the provisions of Table A require that in the case of forfeiture "a certificate of proprietorship shall be delivered to a purchaser," and, according to the provisions of the Act, the certificate is to specify the shares held by him, and the amount paid up on them, and the amount of liability upon those shares. Therefore, so far, the certificate in this case is entirely in accordance with the requirements of Table A; it leaves the appellants liable, on the face of the certificate, for the 1s. 8d. which is unpaid. The contest really has arisen upon the latter part of the certificate, which is in these terms: "The remaining one shilling and eightpence per share has been called up, and is payable by the African Gold Properties, Limited, who were the holders of the said shares prior to the same being forfeited." That is a statement of fact which is literally and accurately true. Then it goes on to say: "And the said New Balkis Eersteling, Limited, is to be deemed to be the holder of the said shares discharged from all calls due prior to the date hereof." That follows the language of article 22 in Table A, which says that "a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase." It seems to me that that was a very reasonable provision to make, because, if he had not been discharged from those calls, questions might have arisen as to whether he was or was not liable to pay interest upon those shares in respect of the calls which had been made. The intention seems to me to be that he is to get a certificate of proprietorship like everybody else, specifying what had been paid on his shares, and leaving him liable, in respect of the balance, to any call which the company may properly make. As regards this call, there is no objection taken to it for want of formality or regularity, or anything of that kind. It seems to me that it is a call that has been duly made, and which the appellants are liable to pay; and therefore I move your Lordships that this appeal be dismissed with costs.

Lord DAVEY: I confess that in the course of the argument for the appellants I had some doubt whether the order which is appealed

from should be supported or not, but reflection has satisfied me that the decision of Mr. Justice BUCKNILL, affirmed by the Court of Appeal, is correct.

It appears to me that the certificate in question follows the terms of article 22 of Table A in the Companies Act. I will remark that if it is in accordance with article 22 no question of *ultra vires* can arise, because it would be ridiculous to say that which is prescribed by an Act of Parliament, agreeing with other articles of a company formed under that Act, could be *ultra vires*. The question really, as it appears to me, turns upon the construction of a few words in article 22—namely, what is meant by saying that the purchaser of a forfeited share from the company is to be deemed to be the holder of such share discharged from all calls due prior to such purchase? Does that mean that he is to be discharged from the liability to pay the amount of calls already due, or does it really mean that that demand which has been made is no longer to affect the title to his share? The words rather favour the first construction, because they are “discharged from all calls due.” Now what is due is the amount of the previous call, not the demand itself; the demand itself is not due, but the amount of the previous call is. But if I look at the whole section and the context in which it is found, and also at the nature of the transaction, I think the meaning must be that the holder of the share as such is to be discharged from any liability under previous demand. The reason why I say so is this: In the first place, the purport of article 22, and the effect of it, and, as you see if you read the whole of it, the contention, is to give the holder of the purchased share a good title—that is to say, a clean title—to the share which he purchases, unaffected by the proceedings which had previously taken place arising out of the non-payment of the previous demand. He is to have a clean title, unaffected by the fact of the previous call having been made, or, in other words, I think the effect is that, so far as the purchaser and any holder from him of that share are concerned, they are to be in the same position as if that prior call had never been made.

But that is a mere question of quieting and perfecting the purchaser's title, and it does not appear to me to affect the question of what it is that he purchases. Now what is it that he purchases? Upon this certificate there can be no doubt what

it is that he purchases—namely, he purchases a 5s. share on which 3s. 4d. only has been paid up; and, therefore, the holder of that share under the Act of Parliament and the previous articles (articles 4 and 6, I think, are the articles) in Table A will be liable to pay the extra 1s. 8d. Whether the company could make such a contract to relieve him from the payment of that 1s. 8d. is, I think, hardly doubtful. They could not do so unless they are expressly authorised. Now there is nothing in section 22, as I read it, which authorises the company to relieve him from the payment of that 1s. 8d. Therefore the result is this, that the purchaser purchases the share *talis qualis*—that is to say, a share upon which 3s. 4d. only has been paid up. He is relieved from any liability under the previous demand or call which has been made by the company, and from any consequences of not complying with that call, but the holder of it is subject to any call which the company may properly make. He holds his share in the same position, in all respects, as if those previous calls had never been made by the company, and with this consequence, that the company *quoad* these particular shares (I am speaking only of the forfeited shares which are the subject of the purchase) is at liberty to make another call, calling up the money over again. Therefore I think that the order appealed from should be confirmed.

LORD JAMES OF HEREFORD: When I first read the papers in this case I confess I shared the doubt to which my noble and learned friend Lord DAVEY has referred as having been entertained by him; but as the case proceeded it seemed to me that the result which has now been stated by my noble and learned friend was perfectly accurate.

The question is really contained in the last words which my noble and learned friend has just uttered. It was contended at the Bar, as I understand, that the company had no power to make a second call on the shares which had been forfeited. It seems to me that it is in that statement that the fallacy lies.

I can see no reason why, when the shares have been forfeited and no call has been received on them, the power of the company should be taken away, and that it should be prevented from obtaining the amount that may be necessary to put it in funds for carrying on

the business of the company by making a second call. The non-payment of a call cannot be equivalent to the receipt of it in any shape or form. That being so, there is nothing injurious to the public interest and contrary to equities existing between the parties that this call should be made and enforced against the present appellants.

Lord ROBERTSON: I entirely agree.

Lord LINDLEY: I am of the same opinion. I am not surprised at this certificate being construed in different ways by different people; but in order to understand it one must understand the subject-matter to which it relates. It is said that a forfeited share is like a table or a chair or any other property which the company has at its disposal. It is nothing of the sort. A forfeited share which is either sold or reissued or parted with, with a view of future use, is a share in the company which involves a great deal.

But the short answer to the appellants' case appears to me to be this: Nobody who knows anything at all about companies and shares and the forms of documents which are in use in business would dream of taking this certificate as a certificate for a fully paid-up share. It is nothing of the sort; it tells you it is nothing of the sort; it tells you how much is paid; it tells you what is not paid; and then it goes on to say that the person who takes this is to be discharged from liability for all calls, which means that there is to be no liability on this share; he is not to be liable for the 10 per cent.; that call, so far as he is concerned, does not affect him; but it tells him, in language which I do not say is so plain that it cannot be misunderstood, because evidently it has been misunderstood, that he has become the holder of a share not paid up in full. Now what is the liability of the man who takes that? It is to pay calls as and when they are made.

Then it is said, "You cannot make two calls." If you look at article 4 you will see that the appellants are asking the House to put a construction upon it which has never yet been put on it, so far as I know, and which would not work in practice at all. What would be the result if, under a certificate of this kind or proceedings of this sort, the company were endeavouring to raise more than five

shillings per share, I do not know, but that point has not arisen. I can conceive that there might be difficulties then; but, as I understand it, they have given credit to the appellants for the money they have actually got from the previous call, and, therefore, this point does not arise. They are not attempting by this machinery to raise more money per share than they were by the Act authorised to raise.

I have no doubt myself that the decision is quite right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Dale, Newman & Hood*, for the Appellants.

Sanderson, Adkin, Lee & Eddis, for the Respondents.



BAILY v. BRITISH EQUITABLE ASSURANCE CO.

1904, February 5, 6, 10. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

Company—Life Assurance—Participating Policy-holders—Rights of Policy-holders to Profits—Power of Company to Alter by New Articles—Companies Act, 1862, ss. 50 and 209—Companies (Memorandum of Association) Act, 1890, s. 1.

A life assurance company constituted by a deed of settlement with byelaws, and originally registered under the Joint-Stock Companies Registration Act, 1844, cannot, when registering itself as a limited company under the Companies Acts, 1862 to 1900, make articles altering the provisions of its byelaws in such manner as to change the contractual rights of the holders of participating policies of the company acquired under the byelaws.

The power which a company has under section 50 of the Companies Act, 1862, of altering its articles by special resolution, though it enables it to alter to some extent the rights of shareholders in respect of their shares, does not enable it to alter contracts between the company and outsiders, or contracts between the company and shareholders otherwise than in respect to their shares.

Allen v. Gold Reefs of West Africa (1) distinguished.

Observations of BYRNE, J., in *Punt v. Symons & Co.* (2) on this point disapproved.

THIS was an appeal from decision of KEKEWICH, J.

The action was brought by a participating policy-holder in the defendant company, on behalf of himself and all other the participating policy-holders, claiming a declaration that the company was not entitled to pay, apply, or dispose of any profits arising from the mutual and participating branch of its business, either in the formation of a reserve fund, or to shareholders, or otherwise than by distributing the same amongst the holders of participating policies, or in accordance with the company's byelaws, and an injunction to restrain the company from paying or applying any such profits contrary to that declaration.

The defendant company was constituted by a deed of settlement dated 15 July, 1854, for the purpose of carrying on the business of a life and fire assurance and of an annuity endowment reversionary interest and loan association. It was registered under the Joint-Stock Companies Registration Act, 1844 (7 & 8 Vict. c. 110), and

(1) [1893] 2 Ch. 311; 62 L. J. Ch. 501; 68 L. T. 846; 41 W. R. 548; 3 R. 471.

(2) 10 Manson, 415; [1903] 2 Ch. 506, 514; 72 L. J. Ch. 768, 772; 89 L. T. 525; 52 W. R. 41.

was afterwards registered under the provisions of section 209 of the Companies Act, 1862, as an unlimited company. Under clause 9 of the deed of settlement, the profits of the company were to be ascertained and divided in manner to be directed by a byelaw or byelaws. By clause 24 power was given to the company at extraordinary general meetings to make byelaws; and by clause 56 it was provided that any of the provisions of the deed of settlement and any byelaw of the company might be altered, repealed, or suspended by a byelaw or byelaws, but not otherwise. The company made byelaws from time to time. Those passed on 6 December, 1854, provided: "(2) That in the beginning of January and July in each year a calculation shall be made of interest upon the amount paid up in respect of each share in the company at the rate of 7l. per cent. per annum up to the next preceding 31st day of December and 30th day of June respectively, and such interest shall at some time in the months of January and July, to be fixed by the directors for that purpose, be payable to the holders of the shares out of the profits of the company only at the company's chief offices for the time being, but every shareholder shall be entitled to receive interest only from the time of the actual payment of the amount so paid up, notwithstanding the payment by any shareholder of interest for the time any call was in arrear. (3) That in the month of January in the year 1858 and in every subsequent third year a general valuation and calculation shall be made of the whole assets and liabilities of the company, and, after carrying forward such portions (if any) of the expenses of establishing the company as the directors shall consider equitable, the net profits of the company's business shall be ascertained by the actuary under the direction of the board of directors. (4) That in the month of January in the respective years last aforesaid a calculation shall be made by the actuary of the profits that have arisen in the departments of business in which the assured are to be entitled to participate in profits, and in such calculation a fair proportion of the interest hereinbefore directed to be paid and of the other expenses of the company shall be charged upon such last-mentioned departments, and the profits so ascertained to have arisen from the said last-mentioned departments of business shall be set apart and divided amongst the policy-holders in such departments by the

actuary under the superintendence of the directors, and the remainder of the profits of the company shall be divided amongst the shareholders according to the amount of shares held by each, and be paid to them along with the next half-yearly dividend."

By byelaws passed on 15 November, 1893, it was provided that there should be a quinquennial valuation and ascertainment of profits and a quinquennial division of profits, instead of a triennial valuation and division, as provided by the byelaws of 1854.

From 1862 until after the date of the plaintiff's policies the company issued prospectuses inviting the public to become policy-holders in the company upon the terms therein stated. These prospectuses contained, amongst others, the following statements:

"The British Equitable Assurance Company affords the public advantages unattainable elsewhere. . . . 1. Mutual Life Assurance Department.—In ordinary mutual societies the public sustain the following disadvantages, which are here avoided: (1) Each assurer in such societies is personally liable for the entire engagements of the society. (2) The policy-holder in such societies loses a large portion of his profits to form a reserve fund, which is, in fact, so much property taken from his family and put into the pockets of foreign parties. (3) The frequent alterations of the constitution of such societies involve considerable risk to the policy-holders. In the British Equitable Assurance Company these defects are avoided. (1) Complete security is given to every policy-holder, absolutely without responsibility. (2) The current expenses of working the company are assessed rateably on the premiums received in the mutual life assurance department and the general premiums, and the entire profits made by the company in the mutual department, after deducting the expenses, are divided among the policy-holders without any deduction for a reserve fund. The policy-holders are thus placed in as good a position the moment they enter the company as if they had been ten years in most other societies. The profits are divided every three years."

In January, 1886, the plaintiff, having seen the prospectus of the company and relying upon the statements therein contained, and on the faith of them, applied to the company to insure his life in the two sums of 400*l.* and 350*l.* The statements above referred to were printed on the back of the form of proposal which he signed,

and formed the basis of his application. The application was to insure a sum payable at death under Table A in company's prospectus, a table which gave the "annual premiums to assure a sum of money at death with profits in addition," at the foot of which was the statement "The entire profits divided triennially."

The company issued to the plaintiff two policies under the seal of the company for 400*l.* and 350*l.* respectively, both dated 30 January, 1886. By these two policies the company covenanted with the plaintiff, after the expiration of one calendar month after satisfactory proof of his death, to pay to his executors or administrators the respective sums of 400*l.* and 350*l.*, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." These policies were in the common form then used by the company in like cases. The plaintiff had paid all the premiums necessary for keeping these two policies on foot, and complied with the conditions thereof.

The company was on 4 July, 1903, registered as a limited company under the Companies Acts, 1862 to 1900, with a memorandum and articles of association in the place of the deed of settlement. The memorandum and articles had been approved by special resolutions of the company, and a petition for confirmation by the Court under the Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), was pending. The plaintiff alleged that by the proposed articles it was intended to alter the existing system of profit-sharing by the plaintiff and other participating policy-holders, and to deprive them of part of the rights theretofore enjoyed by them; that the purport of the proposed articles was that 5*l.* per cent. of the profits of the company's business, including the profits arising from the departments of business in which the assured were entitled to participate in profits, would be set aside to form a reserve fund until such fund amounted to 37,500*l.*; that a fixed annual dividend of 2*s.* 6*d.* per share should be paid to the shareholders out of the profits of the company, and there should be carried to the credit of the shareholders' profits account a bonus equal to 5*l.* per cent. of the divisible profits of the life assurance branch of the company's business; and that subject thereto, unless and until otherwise determined by the

company in general meeting, the divisible profits of the whole of the company's business should be carried to the credit of the life assurance branch and to such fund thereof as the directors should determine; that this scheme if carried into effect would deprive the participating policy-holders of 10 per cent. until the reserve fund so to be formed amounted to \$7,500^l., and after that of 5 per cent. of the profits which, under the former scheme, would have been paid to them, and would enable the directors to divert the whole or any part of the profits to some other fund; and that the proposed scheme was contrary to the terms on which the participating policy-holders effected their assurances, and to the statements contained in the prospectus, and was a breach of the contract contained in and forming the basis of the said policies.

The defendant company alleged that the plaintiff had knowledge or notice of the constitution of the company and of its rules and regulations, which included power from time to time to make alterations and amendments thereof by means of byelaws, and that the proposed alteration in the method of distributing the profits was a fair and businesslike modification thereof carried out in manner permitted by the constitution of the company, and it would be for the benefit of all persons interested in the company.

KERWICH, J., after expressing the opinion that the defendant company were acting in good faith, said that the representation in the prospectus must be regarded as part of the contract with the participating policy-holders, and, in his opinion, there was a contract that there should be no reserve fund, but that the whole of the profits, less a deduction for expenses, should be divisible amongst the policy-holders, and he made a declaration that the company ought to continue to distribute the entire profits accordingly.

The company appealed.

Warrington, K.C., and *Whinney*, for the appellants :

The question depends upon the contract between the company and the participating policy-holders, and that is contained in the prospectus and the several policies, and it is clear from that that the policy-holders are only to have such share of profits as the directors think fit, according to the practice of the company at the

time being. There is nothing in the contract to prevent the company doing what is proposed. If a contract is silent on any subject there may be a collateral contract in a separate document dealing with it; but here the contract is not silent, so no collateral contract can be introduced. That would be varying the terms of a formal contract. *Erskine v. Adeane* [1878] (3) was a different case. That was a case of a lease executed on the faith of a separate agreement, and the decision can be supported on that ground.

The defendants are a company which can only contract in a particular way. Their business is to grant policies, and they can only do so in a particular way under seal. They have no authority under their deed of settlement to make collateral agreements varying their policies. They cannot make a contract in that way.

The policy-holders had notice of the byelaws, and that they might possibly be altered to their prejudice: *Allen v. Gold Reefs of West Africa* [1900] (1) and *Pepe v. City and Suburban Permanent Building Society* [1898] (4). Those were cases of shareholders, but the principle is the same as between the company and an outsider: *Punt v. Symons & Co.* [1908] (2).

P. O. Laurence, K.C., and Gatey, for the plaintiff:

The company can alter their regulations to a certain extent. That is conceded; but they cannot take profits from the participating policy-holders and put them into the general funds of the shareholders. This reserve fund is, in effect, to become capital. The participating policy-holders pay higher premiums than other policy-holders. That must be for some benefits. The prospectus shows that the entire profits are to be divided, and a man who insures on the faith of that contracts on that footing, and the company will not be allowed to go back upon their bargain and apply the profits in a different way.

The cases cited are not adverse to the plaintiff's contention. They only show that a company under the Companies Act, 1862, cannot contract not to alter its articles having regard to section 50 of the Act. This company is not regulated under that Act, but

(3) L. R. 8 Ch. 756, 764; 42 L. J. Ch. 395, 835; 29 L. T. 234; 21 W. R. 802.

(4) [1900] 1 Ch. 656; 69 L. J. Ch. 266; 82 L. T. 210; 48 W. R. 452.

under a deed of settlement, and there is no such statutory provision with regard to companies like this. They can, if they like, put an end to their settlement and have articles; but that is a different matter, and the power cannot be exercised so as to alter contracts already entered into.

Warrington, K.C., in reply :

The effect of registration under section 209 of the Companies Act, 1862, was to import the provisions of that Act, including sections 50 and 51, into the constitution of this company. The deed of settlement became its memorandum and articles of association, and the company has power to alter so much of it as is in the nature of articles, though not that part which is in the nature of a memorandum: *In re European Assurance Society, Ramsay's Case* [1876] (5).

A participating policy-holder, though he may not be a partner so as to be liable to creditors, is in a sense a member of the company: *In re English and Irish Church and University Assurance Society* (No. 2) [1868] (6).

P. O. Laurence, K.C. :

A participating policy-holder is as regards the company in a position analogous to that of a contingent creditor against the estate of a deceased person, and he can interfere to prevent the dissipation of the assets liable to his claim: *Kearns v. Leaf* [1864] (7). Under the contract in the present case the policy-holders are in no sense partners. It is expressly stated in the prospectus that they are to be under no responsibility for the engagements of the society.

[*VAUGHAN WILLIAMS, L.J.*, referred to *Steamship Co. "Norden" v. Dempsey* [1876] (8).

[It was agreed between the parties that the question upon which the decision of the Court was desired was whether, having regard

(5) 3 Ch. D. 388; 46 L. J. Ch. 411; 35 L. T. 654; 25 W. R. 279.

(6) 1 H. & M. 85; 8 L. T. 724; 11 W. R. 681.

(7) 1 H. & M. 681, 708; 10 L. T. 185; 12 W. R. 462.

(8) 1 C. P. D. 654, 662; 45 L. J. C. P. 764, 769; 24 W. R. 984.

to the contractual relations between the company and the participating policy-holders, the company were at liberty to alter the provisions of byelaw 4 of the byelaws of 1854 in such a manner as to alter the rights of those policy-holders under the byelaw.]

Cur. adv. vult.

February 10.

COZENS-HARDY, L.J., read the following judgment of the Court: This is an appeal from the judgment of Mr. Justice KEKEWICH, who has in effect held that the profits attributable to the participating policy branch of the company's business, after certain undisputed deductions, ought to continue to be paid to the holders of participating policies, and ought not to be applied to the creation of a reserve fund or for any other purpose.

The defendant company was originally constituted under a deed of settlement of 1854. [His Lordship referred to clauses 9 and 56 of the deed of settlement, and read byelaws 2, 3, and 4 of the byelaws of 1854, and continued:] These byelaws, so far as material for the present purpose, were in force in 1886, when the plaintiff effected two policies in the mutual or participating branch of the defendant company. It is admitted that the plaintiff relied upon the statements contained in a prospectus issued by the company in which the special advantages of the mutual or participating policies are set forth in emphatic language—for example, whereas in ordinary mutual societies the policy-holder loses a large portion of his profits to form a reserve fund, the entire profits in the defendants' mutual department are divided among the policy-holders without any deduction for a reserve fund. The proposal, which was not before Mr. Justice KEKEWICH, but which has been admitted in evidence before us, shows that it was for a sum "payable at death under Table A." This language is intelligible by reference to the prospectus (page 16), which prints Table A with the following words at its head: "Annual premiums to assure a sum of money at death with profits in addition," and the following words at its foot: "The entire profits divided triennially." The premium payable in respect of a participating policy is of course higher than in respect of a non-participating policy. One of the questions in the proposal, applicable only to policies in the mutual department,

was as follows: "XI.—Are any profits which may be declared to be appropriated by way of addition to the policy, or reduction from the future premiums, or making the policy payable during lifetime?" to which the plaintiff answered: "By way of addition." This proposal was accepted by the company. The actual policy as issued contained a covenant by the company to pay the full sum assured, "and all such other sums (if any) as the said company by their directors may have ordered to be added to such amount by way of bonus or otherwise, according to their practice for the time being." The indorsed conditions mention the deed of settlement and the byelaws and the documents addressed to the company, which would include the proposal; but the words I have read are the only words in the policy itself expressly mentioning profits.

It has been agreed that the only question upon which our judgment is desired is this—whether, having regard to the contractual relations between the company and the participating policy-holders, the company are at liberty to alter the provisions of byelaw 4 of 1854 in such manner as to alter the rights of those policy-holders to profits. This being so, it is not necessary to consider whether, apart from such agreement or admission, there would be any real difficulty in so far connecting the plaintiff's policy with the byelaws and with the prospectus as to identify it with the participating policy described in the prospectus. It must be assumed, therefore, that byelaw No. 4 was originally applicable to this policy. Now, under this byelaw it is for the directors, with the assistance of the actuary, to ascertain what (if any) are the profits of the participating branch, but the amount so ascertained "shall be set apart and divided amongst the policy-holders" in that department. The directors have no power under the byelaw to apply any portion of those ascertained profits to the formation of a reserve fund or to the relief of the shareholders.

It is, however, contended that as the company was registered under section 209 of the Companies Act, 1862, it thereby acquired power by special resolution to alter all or any of the provisions of the deed of settlement, not being in the nature of a memorandum of association, and all or any of the byelaws, and that the plaintiff is seeking to restrain the company from altering byelaw No. 4 in exercise of this statutory power. And it is said that, apart from

the statute, the deed of settlement itself contained a power to alter the byelaw, of which power the plaintiff had notice. I cannot assent to this argument. As between the members of a company and the company, no doubt this proposition is to some extent true. The rights of a shareholder in respect of his shares, except so far as they may be protected by the memorandum of association, are by statute made liable to be altered by special resolution: *Allen v. Gold Reefs of West Africa* (2). But the case of a contract between an outsider and the company is entirely different, and even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a company there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the company, the contracting party had been an individual. A company cannot, by altering its articles, justify a breach of contract.

But it is further contended that by the terms of the policy the company are only bound to pay such profits as the directors, "according to their practice for the time being," may order to be added, and that the directors may regulate their practice by reference to a special resolution creating a reserve fund. This argument really involves the proposition that it is competent to the directors to change a participating policy into a non-participating policy. The word "practice" cannot have such a wide meaning. It cannot justify an alteration of rights or the diversion of any part of the profits from the participating policy-holders. In the present case there was a contract for value between the plaintiff and the company relating to the future profits of a particular branch of the company's business, and the company ought not to be allowed, by special resolution or otherwise, to break that contract. The appeal must be dismissed.

Appeal dismissed.

Solicitors : *Henry Gover & Son*, for both Parties.

SMITH v. LAW GUARANTEE AND TRUST
SOCIETY.

1903, July 23, 29, 30; November 5. 1904, February 12. BYRNE, J.

Company—Debentures—Realisation of Security—Payment on Account of Principal and Interest—Income Tax.

A company's debenture trust deed provided that money arising from realisation of securities should be applied in payment, first, of arrears of interest on debentures, and, secondly, of principal, and the surplus paid to the company. By judgment in a debenture-holders' action it was declared that the trusts of the deed ought to be carried into effect, and the usual inquiries were directed. Under orders in the action payment was authorised and made of dividends on account of arrears of interest to a date found by the chief clerk's certificate, and of income tax. Under subsequent orders payment was authorised of dividends on account generally of what was due on the debentures. Realisation was almost completed, and the past payments made "on account generally," together with any further sum which might be available, if applied solely in discharge of the principal due under the debentures, would not be sufficient to pay the principal in full. The Crown claimed income tax on all payments on account generally :

Held, that payments on account generally ought to be attributed, at the debenture-holders' option, to principal or interest, and income tax paid only on so much as should be attributed to interest.

SUMMONS.

By a trust deed dated 29 June, 1892, and made between the Jarvis Conklin Mortgage Trust Co. (which was an American corporation) of the one part and the Law Guarantee and Trust Society, Limited, of the other part, reciting that the company proposed to issue debentures in several series distinguished by letters of the alphabet other than A and B, and that the society were willing to be trustees for the debenture-holders, a security was created in favour of the society upon property of the company to secure the principal moneys and interest for which the company should become liable under its debentures.

By this deed provision was made (clause 9) for realisation by the trustees in case of default by the company in payment of the principal moneys secured by the debentures, or of interest thereon; and by clause 11 it was provided that "the trustees shall hold the money to arise under clause 9 from the securities appropriated for each series of the debentures upon trust thereout in the first place to pay or retain the costs and expenses incurred in or about the

execution of the trusts hereof, including their own remuneration, and to apply the residue of such moneys first in or towards payment of all arrears of interest remaining unpaid on the debentures of such series ; secondly in or towards payment to the debenture-holders of such series *pari passu* in proportion to the debentures of such series held by them respectively and without any preference or priority on account of priority of issue or otherwise howsoever of all principal moneys due on such debentures, and that whether the same principal moneys shall or shall not then be payable according to the tenor of the same debentures ; and thirdly to pay the surplus of such moneys to the company or its assigns."

Clause 13 provided that upon any payment under clause 11 to the registered holder of a debenture on account of the principal moneys or interest thereby secured the trustees should be entitled to require the production of any debentures in respect of which they were making payment, and should in the event of production cause a memorandum of the amount and date of payment to be indorsed thereon ; but the receipt of the registered holder of each of the debentures or, in case of joint-holders, of any one of the registered joint-holders as regarded principal money, and the delivery to the trustees of interest coupons as regarded interest, should be a good discharge to the trustees, who should be entitled in their discretion to dispense with production of the debenture upon a proper indemnity being given, but not to dispense with production of the coupons.

By clause 14 the company undertook to pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof.

In 1893 this action, which was a debenture-holders' action, was brought on behalf of the holders of a "C" series of debentures issued by the company ; and by judgment in the action dated 8 December, 1893 (the society undertaking until further order not to part with or dispose of, without the leave of the Court, any of the securities in their hands in England, or which should thereafter come to their hands in England, comprised in the trust deed), it was declared that the mortgage debentures of the series "C" constituted a first charge upon all property and effects comprised in the deed, and that the trusts of the deed ought to be performed and

carried into execution ; and accounts and inquiries usual in a debenture-holders' action were directed, the first being an account of what was due for principal and interest to the holders of the "C" series.

By an order dated 6 August, 1894, it was ordered that the society should be at liberty to pay 2 per cent. on the amount of the debentures of the "C" series on account of interest in arrear.

By an order of 2 April, 1895, it was ordered that the society should, out of the funds in their hands to the credit of income, pay on account of arrears of interest due a further dividend of 2 per cent. on the capital amount of the debentures, and that the trustees should be at liberty to pay the income tax thereon, and on the payment under the order of 6 August, 1894.

These orders were duly acted upon, and payments made accordingly.

By the chief clerk's certificate filed on 24 April, 1895, it was found that there was due to the holders of the "C" debentures the sum of 128,000*l.* for principal and a sum of 8,702*l.* 6*s.* 5*d.* for interest, calculated up to 1 October, 1894. That date was the last half-yearly date, prior to the making of the certificate, for payment of interest under the debentures. The schedule to the certificate showed the names of the then holders of the debentures, and the amounts respectively due to them for principal and interest to the same date.

In pursuance of an order of 14 June, 1895, a further sum was paid on account of interest, income tax being duly deducted and paid by the society.

On 15 June, 1896, upon a summons taken out by the plaintiff which came before the Judge in Chambers personally, an order was made whereby it was ordered that the society should be at liberty out of cash in their hands to pay the balance of interest found due to 1 October, 1894, by the chief clerk's certificate, and then out of any surplus to pay a dividend of 1 per cent. on account of what was due on the debentures. In fact, under that order, the actual amount paid in respect of interest appeared to have exceeded (with the amounts previously paid) the amount found due. Income tax was duly paid on that.

By an order of 21 July, 1897, it was ordered that the society should be at liberty out of cash in hand to pay a dividend of 10 per

cent. calculated on the face value of the debentures on account generally of what was due on the debentures for principal and interest, and having regard to the fact that the registers of the company had been removed to New York and were not open to inspection, and having regard to the chief clerk's certificate and to the notices received by the society of devolution of interest in debentures since the certificate, the society were to be at liberty to continue to make such payments to the debenture-holders mentioned in certain lists therein referred to.

Further orders were from time to time subsequently made in similar terms to that last mentioned, and there had been paid in all to the debenture-holders a sum of 104,550*l.* on account generally of principal and interest. These moneys arose from realisation by the society from time to time of securities included in the trust deed. In April, 1897, there was a dividend paid direct from the general assets of the company under an American decree, without any express direction as to its application for principal or for interest. The realisation had now been completed except to an amount which was not likely to exceed 4,000*l.*, and the society, as trustees, had in hand a sum of about 1,900*l.* It was estimated that the final dividend available for the debenture-holders would probably not exceed 5 per cent. calculated on the face value of the securities, and it appeared to be certain that if the whole of the past payments which had been made generally on account, and any further sum available for the debenture-holders, were attributed and applied solely in payment of principal, they would be insufficient to discharge the whole amount thereof.

The Inland Revenue authorities claimed income tax on all payments made generally on account of principal and interest, and a summons was therefore on 21 March, 1903, taken out by the society asking for the direction of the Court as to whether the payments made to the holders of the "C" debentures under the order of 15 June, 1896 (so far as it directed a payment of 1 per cent.), and under the orders of and subsequent to 21 July, 1897, and any further payments to be made, not exceeding in all the principal sums secured by the debentures, were to be treated as payments made wholly in respect of capital, or whether any and, if so, what parts thereof ought to be treated as payments in respect of interest,

and whether any and, if any, what provision ought to be made for income tax thereon.

The Board of Inland Revenue consented to appear on the summons to argue from the point of view that as much as possible of the payments ought to be attributed to income, and that income tax should be paid out of the remaining funds.

The summons was adjourned into Court.

E. Beaumont, for the applicants.

Levett, K.C., and *A. à B. Terrell*, for the plaintiff :

The Crown is not entitled to income tax upon principal. A creditor can appropriate as he likes, if nothing is said, on payment by the debtor, and there is no appropriation by the debtor. When payment is made generally on account of principal and interest it is attributable *pro ratâ*.

[*Vaughan Hawkins* referred to *Bower v. Marris* [1841] (1).]

Coldridge, for a party attending in the same interest :

Cory Brothers v. Owners of Steamship Mecca [1897] (2) fully recognises the creditor's right to appropriate. His intention may no doubt be presumed. Here there are two distinct debts—one for principal, the other for interest—and there cannot be any doubt which way the creditor will appropriate. If he appropriates to interest, he endows the Crown ; if to capital, he puts the money in his pocket and keeps it. There will not be 20s. in the pound for the debenture-holders on their capital ; nor was there in 1896. If the debenture-holders' trustees had the power to appropriate, it would be a breach of trust on their part to appropriate to the detriment of their *cestuis que trust*. Clause 11 was put in the deed for the benefit of the debenture-holders. The debenture trustees could not therefore under that clause appropriate to interest. The Crown relies on *Bower v. Marris* (1) as an authority for claiming income tax where there is no income. Of course, the claim is not put quite so plainly as that. The Crown says that, if the creditors

(1) Cr. & Ph. 351, 355 ; 10 L. J. Ch. 356, 359.

(2) [1897] A. C. 286 ; 66 L. J. P. C. 86 ; 76 L. T. 579 ; 45 W. R. 667.

get 18s. in the pound, they are to take 15s. for principal and 3s. for interest, and the Crown gets income tax on the 3s. The creditor has the right to appropriate: *Chitty v. Naish* [1884] (3). There is nothing in section 24 of the Customs and Inland Revenue Act, 1888, which imposes on a trustee the obligation to appropriate to the detriment of the *cestui que trust*. It does not impose on him the obligation of subjecting to a liability money which is subject to no liability when it comes into his hands. There are no profits and no gains here. No income tax is payable: *Foley v. Fletcher* [1858] (4). The debenture-holders could, if they had pleased, have released the interest.

[BYRNE, J., referred to *Secretary of State in Council of India v. Scoble* [1908] (5).]

A Debenture-holder in person.

Vaughan Hawkins, for the Crown :

In *London County Council v. Attorney-General* [1900] (6) Lord MACNAGHTEN and Lord DAVEY go into the history of the Income Tax Acts. This money comes from American securities, which have not paid income tax.

[BYRNE, J. : Proceeds of sale of American securities remitted to these trustees, are in their hands, to be dealt with in a certain way.]

Under the deed the trustees were to apply the money first in payment of income, and then in reduction of capital. Counsel for a party attending says that, by a sort of retrospective operation, the creditor gets out of paying income tax—that there were two debts, and he has an election to appropriate. But he has no election; the appropriation has been made once for all by the trust deed. No one has ever before heard of the principle of

(3) 2 Dowl. P. C. 511.

(4) 3 H. & N. 769; 28 L. J. Ex. 100; 7 W. R. 141; 5 Jur. (N.S.) 342.

(5) [1903] A. C. 299; 72 L. J. K. B. 617; 89 L. T. 1; 51 W. R. 675.

(6) [1901] A. C. 26; 70 L. J. Q. B. 77; 83 L. T. 605; 49 W. R. 686; 65 J. P. 227.

election being applied to a payment of interest and capital ; but if there is any election it is made by the deed. In the ordinary case of mortgagor and mortgagee the rule is that a general payment shall be applied in the first place to sink the interest, before any part of the principal is discharged : Fisher on Mortgages (5th ed.), pp. 723-4, par. 1514. There could be no holding of the election, if it existed, in suspension. The plaintiff's contention is that by the orders commencing in 1896 there was a departure from the trust deed, which was thus put aside, and there was to be payment of interest and principal *pro ratâ*. But, if there was a doing away with the deed, why stop at a *pro ratâ* appropriation and not appropriate, as a party attending claims, solely to principal? Under section 21 of the Conveyancing and Law of Property Act, 1881, the money received by a mortgagee exercising the power of sale under the Act is to be applied, after payment of costs, charges, and expenses, "secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage." It may be that there might be machinery by which the debenture-holders as a whole could alter the course of payment directed by the deed ; but there is not, in fact, anything of the sort here. The class of cases of which *Turner v. Newport* [1846] (7) is an example have nothing to do with this case. The fact that the ultimate division of the money may be in many different directions under various settlements is immaterial. "When once the thing is ascertained as being subject to income tax, it matters not what is done with it afterwards ; when once that comes within the grasp of the Income Tax Acts it is liable to income tax whatever may be its destination or whatever use it may be put to" : *Nizam State Railway v. Wyatt* [1890] (8), citing *Blake v. Brazilian Railway* [1884] (9). *In re Middlesborough, &c., Building Society, Ex parte Wythes* [1885] (10), was rightly decided ; there was no obligation to account to the Crown. *Secretary of State in Council of India v. Scoble* (5) and *Foley v. Fletcher* (4) are cases only showing that when a payment is made for interest income tax is payable, but

(7) 2 Ph. 14 ; 1 C. P. Cooper, 147.

(8) 24 Q. B. D. 548, 554 ; 59 L. J. Q. B. 430, 431, 432 ; 62 L. T. 765.

(9) Rep. Tax. Cas. vol. 2, part 27, p. 58.

(10) 53 L. T. 492.

that when it is for both principal and interest income tax is only payable on that which is shown to be interest. The Crown relies on *Bower v. Marris* (1). Lord COTTENHAM lays down the rule as stated in *Fisher on Mortgages*. The Crown's claim rests on general principle and on the special provisions of the trust deed.

There is a limit of time for making assessments on persons liable to income tax, but no limit of time in respect of claims for non-payment. Section 68 of the Taxes Management Act, 1880, relates purely to assessment.

Lerett, K.C., in reply :

The Crown does not seem to know what is capital and what is income. Income tax is not payable on capital. The Crown is trying to do just what it failed to do in *Secretary of State in Council of India v. Scoble* (5). When the chief clerk's certificate was made, the capital was as much a debt as the income.

Of course, when income only is due, a payment goes to pay that off. But here, when the action was brought, capital was due to the amount of 120,000*l.* The Crown says that, if there is a debt of 100*l.* and 10*l.* interest, and it takes five years to realise, and the realisation is only 50*l.*, the whole of that is income! The orders were made on account generally of what was due. *Bower v. Marris* (1) rather supports the argument of a party attending that the mortgagee can appropriate to what he likes. The provisions of clause 11 only apply to a current deed, not when the principal is due. A debenture-holder can say to his trustee, "I choose to take capital first"; and the trustee is bound to obey him, no matter what the deed says. The true view under the orders is on each occasion to see how much represents income and how much capital, and so to take each payment *pro ratâ*.

Cur. adv. vult.

1908, November 5.

BYRNE, J. (after stating the facts): It is contended on behalf of certain of the debenture-holders that, there having been no attribution of these past payments to capital or to interest or otherwise than as payments on account generally of the amount due, they are entitled to elect now to treat all such payments, and also any future payments, as being payments on account of principal,

in which case there is no income tax payable. On behalf of the plaintiff, as representing the general body of debenture-holders, it is argued that the past payments ought, in the most hostile aspect, to be treated as having been made rateably on account of principal and interest from time to time due; that these have been finally made; and that, if by error or from oversight income tax which has not been ought first to have been deducted from so much of the payments as represents the rateable proportion attributable to interest, things must stand as they are; and that it is now competent for the *cestuis que trust* under the deed to say, "We now elect to receive further payments as and for capital." This injures no one. The mortgagors cannot be injured; and, if by some chance further assets should be discovered and come in, this method of dealing with the fund cannot be worse, and may be better, for the mortgagors. For the Inland Revenue the argument, shortly, is that the payments were on account generally, and that means on account of principal and interest subject to adjustment at a future date. When adjusted, if it appears that payments have been made on account of interest, income tax ought to be answered out of any balance of trust funds, because the Court will, so long as trust property remains to be distributed, take care that any adjustment shall be so made as to make good any payments which ought properly to have been made had circumstances allowed them to have been made from time to time as and when they ought to have been; and, further, that, the deed having provided for payment first of interest, and a judgment having been given for execution of the trusts, every payment must be treated, in the absence of other directions, as having been made in accordance with the terms of the trust. The trustees, the society, are only concerned in seeing that they are indemnified against any possible claims against them personally on behalf of the Inland Revenue authorities.

Having considered the various orders made, I have satisfied myself that in ordering payment on account of what was due generally there was no intention to alter or affect the rights of any of the parties, and that, in effect, the matter stands before me in the same position in regard to the rights as between mortgagors

and mortgagees as though I had now to deal with the whole fund for distribution, subject only to this—that I have no jurisdiction in this action to direct repayment of anything which has already been paid.

To further clear the ground, I will next express my opinion that I cannot accept the argument that I must treat the payments already made as having been made rateably on account of principal and interest. The Court has not directed that they should be so made, either directly or by implication, but simply that they should be made on account generally of what was due. Exactly why the orders were so made I am unable to say with certainty, but there is no difficulty in understanding that there were sufficient reasons, and it is enough to point out that there was no certificate of what was due for principal and interest brought up to date. It was quite possible, so far as appears, that there would ultimately be realised enough to pay principal and interest, in which case no question would ever arise, and it might have been thought reasonable to give time to ascertain whether or not the mortgaged property would prove sufficient or insufficient, so that, if there were any option to take as for principal and interest, time might be given to raise the question of right to elect. I am unable to accept the argument grounded in general terms on the doctrine approved in *Cory Brothers v. Owners of Steamship Mecca* (2), as to the right of appropriation of any payment on the part of the creditor to the last moment, where the debtor has not, in making the payment, himself appropriated its destination. This is a doctrine applicable as between debtor and creditor in the absence of express contract; but in the present case there was an express contract that moneys realised should be applied in a particular way—namely, in payment first of interest and then of principal. Nor can I say that the trust ceased to be effective *ipso facto*, because the estate has turned out insufficient. I agree with the argument of counsel for the Crown upon this point. But I accept the view which was presented to me on behalf of the plaintiffs that the provision in the deed for payment of interest first is one inserted obviously for the benefit of the creditors, and one therefore which they could waive if they so desired in the absence of opposition by the debtors, who in the present case do not oppose, nor is it conceivable that they could have any reason for opposing. It has

been argued that it is impossible to permit any choice or right of election to appropriate to the creditors, because many of the debenture-holders may be trustees and would have to distribute amongst their own *cestuis que trust*, having regard to the quality of payments made to themselves, whether as for principal or for interest.

I will not pretend that the case is otherwise than complicated and difficult; but, having fully considered it, the matter presents itself to me in this way. As between the society and the company it is matter of absolute indifference to the mortgagors how the proceeds of realisation are disposed of, as they have nothing coming to them in any event. If they had any conceivable interest in the matter, it would, of course, be in favour of the application of the moneys in payment of capital first, contrary to the terms of the deed. As between the society holding the proceeds of realisation and their *cestuis que trust*, the debenture-holders, the provision may, as I conceive, be waived by the *cestuis que trust*. How the moneys ought to be dealt with when received by the debenture-holders is a question, if they are trustees, between them and their *cestuis que trust*. Moreover, the Court is not executing any trusts as between the last-named parties. But, this being an action for the common benefit of a number of creditors standing as between themselves *pari passu* as to their rights, no one or more of them could elect to receive moneys contrary to the terms of the deed, to the detriment of any other of them. It cannot, however, be to the detriment of any of them that any other or others of them should receive payments as for principal instead of as for interest, because, on working out the account, any such payment must work in favour of those who desire to be paid strictly in accordance with the deed. The society have nothing to do with the question whether or not their *cestuis que trust* are trustees for others; they pay to the persons entitled under the deed, in accordance with the trusts of it, or otherwise, at the option of their payees, unless this could work injustice to others.

I think the true solution of the matter, and one which will preserve all rights, is this: Let all payments heretofore made by the society on account generally be attributed, at the option of the payees as between themselves and the society at their election, as

payments on account of principal or of interest, all such sums to be deemed to be so attributed without prejudice to any question whether or not such payments, or any part or parts thereof, are in the hands of the payees to be treated as capital or interest. In case any of the debenture-holders, payees, shall elect to have the payments to them made, in accordance with the deed, in discharge of interest first and then of principal, an account will have to be taken, having regard to the election of such of the debenture-holders as shall have elected in favour of past receipts being treated as capital so to take, of what remains due to the debenture-holders, and let any balance now or hereafter to become distributable, subject to costs, charges, and proper deductions, be distributed accordingly. If, as I should apprehend would be the case, all the debenture-holders elect to take their past and future payments as for capital, there will probably be no occasion to take any account. The Inland Revenue will then, of course, look for payment from the debenture-holders of any income tax properly payable by them in respect of moneys, however paid to them, which in their hands are distributable as income. I imagine that, having regard to the considerable amounts already paid on account generally, if there be trustee debenture-holders they must already have made payments for income from which they have deducted income tax. Of course, provision will have to be made for payment of income tax upon so much, if anything, as is paid to debenture-holders as income.

I have not referred in detail to the authorities cited, because I do not think that any of them really touch the actual point I have to decide. If anything that has been paid was in fact interest, income tax ought to have been paid or to be provided for; but, in the view I take, none of it was definitely paid as interest. The order will require settling carefully, but I think I have sufficiently stated the principle on which it must be framed.

1904, *February* 12.

The minutes of the order were settled as follows: "The Court declares that all payments heretofore made by the applicants to the holders of debentures of the 'C' series in the defendant company 'on account generally' of what was due thereon ought to be attributed at the option of the holders of the said debentures as

between themselves and the applicants as payment on account of principal or of interest, and no income tax is payable in respect of so much thereof as is attributed to capital; but this declaration is without prejudice to the question whether or not such payments or any part or parts thereof ought, in the hands of the persons to whom payments have been made, to be treated as capital or interest. And in case any of the holders of the said debentures shall elect to treat the said payments heretofore made 'on account generally' of what was due on the said debentures as having been made in discharge first of interest then due and as to the balance in discharge of capital, let an account be taken to ascertain how much out of the amounts paid 'on account generally' as aforesaid ought, in accordance with such election, to be treated as having been paid in respect of interest, and how much in respect of capital. And out of any moneys now or hereafter to become distributable in respect of the said debentures whose holders should have so elected, let the applicants first pay the income tax payable in respect of the amounts found to have been paid in respect of interest as aforesaid. And it is ordered that, subject as aforesaid, any moneys now or hereafter to become distributable amongst the holders of the said debentures of the 'C' series in the defendant company may be paid, at the option of the holders of the debentures as between themselves and the applicants, on account of principal or of interest, but so that (inclusive of payments already made on account of principal) no more than 20s. in the pound be paid on account of principal secured by any of the said debentures; and income tax is to be paid on such part thereof (if any) as shall be payable on account of interest."

Solicitors: *Gribble, Oddie, Sinclair & Johnson*, for Applicants.

W. H. Smith & Son, for the Plaintiff.

Bennett & Chance, for the Party attending.

Solicitor of Inland Revenue, for the Crown.

IN RE CUSSONS, LIMITED.

1904, February 19. KEKEWICH, J.

Company—Vendor and Purchaser—Title—Legal Estate—Private Partnership—“Company duly Constituted by Law”—Registration—Vesting of Real Estate—Companies Act, 1862, Part VII., ss. 180, 192, 193—Statute of Limitations—Trustee—Possession—Real Property Limitation Act, 1833, s. 34—Real Property Limitation Act, 1874, s. 1.

In 1887 C. and seven other persons formed a private partnership, and immediately afterwards C. conveyed to the eight partners certain real estate to hold unto and to the use of the grantees as part of the joint-stock assets of the partnership. Shortly afterwards the business was converted into a limited liability company, and the Registrar of Joint Stock Companies gave a certificate of incorporation as of the date of the formation of the partnership. There was no deed of conveyance of the property to the incorporated company, but in 1891 the company conveyed it by deed to a new company, which in 1902 agreed to sell it to a purchaser. Upon the purchaser's contention that the legal estate was outstanding in the eight grantees:

Held, that the partnership was not a “company duly constituted by law” within the meaning of section 180 of the Companies Act, 1862, so as by section 193 of that Act to vest the legal estate in the incorporated company; and that the legal estate was therefore left in the grantees or the survivor of them in trust for the company.

But *held*, that the legal estate in the grantees as such trustees was, in view of the undisturbed possession of the new company since 1891, barred and extinguished by operation of the Real Property Limitation Acts, 1833 and 1874, and that the vendors had therefore shown a good title.

Kibble v. Fairthorne (1) applied.

THIS was a purchaser's summons under the Vendor and Purchaser Act, 1874, asking for a declaration that her objections to the title shown by the vendors had not been sufficiently answered.

By an agreement in writing dated 5 November, 1902, Mrs. M. E. Lackenby agreed to purchase from Cussons, Limited, for 1,900*l.* a piece of freehold ground with a factory and other buildings thereon at Kingston-upon-Hull. The vendors delivered an abstract of their title, which disclosed a conveyance dated 14 July, 1887, by which William Cussons conveyed to eight named persons, including himself, all and singular the assets specified in a schedule thereto, to hold the same unto and to the use of the said eight persons as part of the joint-stock assets of a company or partnership

(1) [1895] 1 Ch. 219; 64 L. J. Ch. 184; 71 L. T. 755; 43 W. R. 327; 13 R. 75.

constituted by a deed of articles of partnership dated 13 July, 1887, and recited in the conveyance. Notice of the partnership was put upon the title.

The title further disclosed a conveyance of the property dated 26 February, 1891, from the Hull and East Riding Supply Association, Limited, to the present vendor company, and it appeared that the above-mentioned eight persons had converted the business into a limited liability company called the Hull and East Riding Supply Association, Limited, under the provisions of Part VII. of the Companies Act, 1862. A certificate of the Registrar of Joint-Stock Companies dated 27 July, 1887, gave 13 July, 1887, as the date of the incorporation.

Under these circumstances the vendors submitted that no conveyance from the eight persons named in the deed of 14 July, 1887, to the intermediate company was necessary on the ground that the property had become vested in the incorporated company in 1887 by virtue of the provisions of the Companies Act, 1862, Part VII.(2).

(2) The material sections of the Companies Act, 1862, Part VII., are as follows:

Section 180: "With the above exceptions, and subject to the foregoing regulations, every company existing at the time of the commencement of this Act, including any company registered under the said Joint-Stock Companies Acts consisting of seven or more members, or any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the Stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up."

Section 192: "A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the company is authorised to be registered under this Act as a limited or unlimited company, as the case may be, and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act."

Section 193: "All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein."

The purchaser, however, contended that the legal estate in the property agreed to be sold was not vested in the vendors, but was outstanding in the eight partners, and she required their concurrence in the conveyance to her, or that the legal estate outstanding in them should be got in by the vendors by independent assurance. The vendors refused, and the purchaser thereupon took out this summons.

Upon the hearing of the summons the vendors also submitted that if the legal estate was held to be outstanding it was barred and extinguished by virtue of the Real Property Limitation Act, 1874, in view of the conveyance of 1891.

Redman, for the purchaser :

There is no act of conveyance between the conveyance in 1887 of the fee-simple to eight persons in trust for a trading partnership and the conveyance in 1891 by a limited liability company. The legal estate is consequently outstanding in the grantees of 1887, and the vendors have not shown a good title.

A. Adams, for the vendors :

A sufficiently good title has been shown, for by virtue of sections 180 and 193 of the Companies Act, 1862, the property was vested in the corporation. In section 180 "a company otherwise duly constituted by law" must mean a company constituted in any other legal way, so as to include a large partnership of the kind here created by the articles of partnership dated 13 July, 1887, and section 192 says that the certificate of the Registrar shall be "conclusive evidence" that all the requisitions in respect of registration have been complied with. This being so, by section 193 all the property vested in the eight persons who were the company at the date of registration passed to and vested in the incorporated company "for all the estate and interest of the company therein": *Reg. v. Registrar of Joint-Stock Companies* [1891] (3).

Secondly, if the Court holds that the legal estate is outstanding, then, as the vendors have shown a conveyance to them of the property more than twelve years ago, such legal estate is barred

(3) [1891] 2 Q. B. 598; 61 L. J. Q. B. 3; 65 L. T. 392; 39 W. R. 708.

by statute and extinguished: Real Property Limitation Act, 1888, s. 34, and Real Property Limitation Act, 1874, s. 1.

[KREKOWICH, J.: But the possession of the *cestui que trust*, whether the company or the partnership, is the possession of the trustees, and the property must be regarded as still in the trustees.]

Not so; for in *Kibble v. Fairthorne* [1895] (1), which was a case of mortgagor and mortgagee, it was held that twelve years' possession by the mortgagor barred the mortgagee and extinguished his title, although a prior mortgage had been in existence during the earlier part of the time; and that decision can be applied to a case of *cestui que trust* and trustee. Here it is the bare legal estate only which is claimed, and the vendors are entitled to the benefit of the statute, of which they warned the purchaser before her summons was taken out.

Redman, in reply:

If the vendors claim to rest their title on a possessory title, then this must be treated as an open contract, and they must show what they cannot show—possession for at least forty years, and not twelve years: *Jacobs v. Revell* [1900] (4).

A. Adams:

In *Games v. Bonnor* [1884] (5) a possessory title of twelve years under the Statute of Limitations was held good.

KREKOWICH, J.: In 1887 eight persons, including Cussons, were minded to constitute a partnership until then carried on by one only, and for that purpose formed themselves into a partnership or company, and had articles of association by which it was agreed that Cussons and the others should together hold the assets, including the property in question, mentioned in the schedule. Then came the deed of conveyance of 14 July, 1887, conveying this property to the eight persons, including Cussons, to hold upon the trusts therein declared. That seems to me to be a very plain

(4) [1900] 2 Ch. 858, 869; 69 L. J. Ch. 879; 83 L. T. 629; 49 W. R. 109.

(5) 54 L. J. Ch. 517; 33 W. R. 64.

conveyance of the legal estate to the eight persons as trustees for the partnership.

I take it that if two persons are carrying on business and choose to have property conveyed to themselves, their heirs and assigns, as joint-stock property, the two have the legal estate in the property vested in them as joint tenants; but they hold it upon trust for themselves in equity as tenants in common. But this means that their conveyance is required to pass the legal estate to any one else. That seems to me to be the case here. Now, the partnership here was presently turned into a limited liability company, and the Registrar, as the proper officer, has given his certificate, which, by virtue of section 192, is conclusive evidence of the registration and incorporation of the company. Then it is said that by virtue of section 193 this particular property was vested in the company. What was the estate and interest of the company therein? It does not seem to me that this property was vested in the company except in equity. All that passed by the conveyance was a purely equitable interest conferring a right to call in the legal estate.

Then it was argued that the eight persons were the company; and this is true in a sense, as they were registered. But, in my opinion, they were quite a different entity; a number of partners and a partnership are quite different things. In my opinion, the Companies Act can only vest in the incorporated company what was vested in the company applying for registration. Now, the legal estate was clearly vested in the eight grantees, and the result is that, subject to the further question, which I will at once consider, it is outstanding in the survivor of those grantees, or his heirs or assigns.

The other point taken on behalf of the vendors is that the right to have the legal estate got in is gone by reason of the Real Property Limitation Act, 1874, which reduced the period from twenty years to twelve years. Here twelve years have elapsed since the incorporated company have been in possession, and the trustees have not interfered as trustees. This seems to me to be a new application of the Act, that a person who is a bare trustee without duties may lose his trust estate at the end of twelve years if he does not interfere. But I do not see why he does not come

within the section, and I think that this contention on behalf of the vendors is right. One can see cases where a trustee might keep alive the right that he has by bringing an action of ejectment; but if he allows the *cestui que trust* to remain in possession the statute must run against him, and by virtue of the Act of 1874 and the earlier Act the title is gone. I accordingly declare that in this case the vendors have made a good title, but there will be no order as to costs.

Solicitors: *Dangerfield & Blythe*, agents for *George Twell*, Hull.
Woodhouse & Davidson, agents for *J. T. Woodhouse*,
Aske & Ferens, Hull.

TOWERS v. AFRICAN TUG CO.

1904, February 29; March 1. C. A. VAUGHAN WILLIAMS,
STIRLING, AND COZENS-HARDY, L.JJ.

Company—Directors—Ultra vires—Payment of Dividends out of Capital—Knowledge of Shareholders—Action for Recoupment by Shareholder on Behalf of Self and other Shareholders—Retention by Plaintiff of Share of Dividend at Time of Action—Right of Action.

Directors of a company in March, 1900, paid an interim dividend to the shareholders which was in fact a payment out of capital. The payment appeared on the balance-sheet presented to the shareholders for the year ending 31 July, 1900, and approved by them, and the amount of the dividend was in process of being recouped out of the profits of subsequent years. In March, 1903, two of the shareholders of the company who had received their respective shares of the dividend, with full knowledge of all the facts, and still retained them, brought an action on behalf of themselves and other shareholders of the company against the company and the directors to make the directors repay the amount of the dividend, on the ground that the payment was an *ultra vires* payment:

Held, that the plaintiffs could not, in the circumstances of the case, maintain the action.

Per VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J.: A shareholder who has, with full knowledge of the facts, received part of the capital of the company as dividend, cannot maintain an action against the directors of the company to make them repay the amount of the dividend, on the ground that the payment was *ultra vires*, while he retains his share of the proceeds of the *ultra vires* act; and the fact that he brings the action in the name of himself and the other shareholders gives him no higher right.

Dictum of BRETT, L.J., in *In re Exchange Banking Co., Flitcroft's Case* (1), applied by COZENS-HARDY, L.J.

THIS was an appeal from a decision of BYRNE, J.

The action was brought by two shareholders in the defendant company, Messrs. Towers and Wedlake, on behalf of themselves and all other the shareholders of the company other than those who were defendants, against the company and two of the directors, Messrs. Alexander and Wood, claiming a declaration that a resolution for the payment of an interim dividend passed by the defendants Alexander and Wood on 20 March, 1900, and the payment of the dividend therein referred to, were respectively *ultra vires*, and that the defendants Alexander and Wood were jointly and severally liable to make good to the company 127*l.* 10*s.*, the amount of the

(1) 21 Ch. D. 519; 51 L. J. Ch. 525; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174.

dividend which was alleged to have been paid out of capital, and judgment against them for payment of such money and interest accordingly.

The company was incorporated in 1896 under the Companies Acts, 1862 to 1893. The articles of association provided (article 36) that the company in general meeting might declare a dividend to be paid to the members according to their rights and interests in the profits, and (article 37) that the directors might from time to time pay to the members such interim dividends as in their opinion the position of the company justified.

In 1899 the defendants Alexander and Wood and the plaintiff Wedlake were the directors of the company, and the plaintiff Towers was secretary and manager. Two directors were a quorum. On the balance-sheet of the company for 1899, made up to 31 July, 1899, the end of their financial year, there was a debit balance against the company of 756*l.* 10*s.* 11*d.* Between 1 August and 31 December, 1899, the company had made a profit of about 300*l.* On 20 March, 1900, the defendants Alexander and Wood resolved that there should be a payment of a dividend of 5 per cent. to the shareholders, amounting to 127*l.* 10*s.*, and they sent written instructions to the secretary to that effect. This dividend was paid, and the payment was confirmed at a board meeting held on 5 July, 1900, at which the plaintiffs Alexander and Wood were present as directors and the plaintiff Towers as secretary. The plaintiff Wedlake was not present at this meeting, and it was alleged in the statement of claim (paragraph 14) that he was never consulted as to, or took part in, the declaration or payment of this dividend. On the balance-sheet for the year ending 31 July, 1900, a profit of 245*l.* 18*s.* 4*d.* was shown. In this balance-sheet there was entered on the credit side, under the head of "Debtors," "Overpaid dividends, 86*l.* 17*s.* 11*d.*," and "Dividends not earned, 127*l.* 10*s.*" There was also entered "Profit and loss account as at 31 July, 1899, 756*l.* 10*s.* 11*d.*, less profit for year, 245*l.* 18*s.* 4*d.*, 510*l.* 12*s.* 7*d.*" The auditor on 20 August, 1900, sent to the directors of the company with this balance-sheet a letter, in which he stated, "The dividend paid in March last not having been earned, I have added the amount and dividends overpaid some time ago, which makes the total on the asset side 164*l.* 7*s.* 11*d.* I should

like to point out that it is illegal to pay dividends unless they are earned, and the directors are liable in such cases, as it amounts to paying dividends out of capital." This balance-sheet and the auditor's report were before the board on 14 September, 1900, and they were submitted to the annual general meeting of the company held on the same day, and the balance-sheet was adopted. Both the plaintiffs were present at the two meetings held on this day. In the balance-sheet for the year ending 31 July, 1901, a further profit was shown, and in the balance-sheet for the year ending 31 July, 1902, it was shown that the debit balance had been nearly wiped out.

The action was brought on 20 March, 1903, at which time Towers had ceased to be secretary and manager of the company. All the other shareholders of the company were, by an order of 29 June, 1903, at their own request added as defendants to oppose the plaintiffs' claim. The defence alleged that the action was in fact really only by two shareholders, and not on behalf of any other shareholder, that the dividend was paid in good faith, and that the plaintiffs were estopped by their own *laches* and acquiescence from putting forward their claims; and there was a counterclaim, in the event of the plaintiffs being declared entitled to relief, for repayment by them of the dividends received by them respectively on their holdings, 15*l.* and 17*l.* 10*s.*, which, as was alleged, they had received and had since retained with full knowledge of the facts.

BYRNE, J., on 6 November, 1903, declared that the resolution of 20 March, 1900, and the payment of dividend therein referred to, were respectively *ultra vires*, and he ordered the defendants Alexander and Wood to pay to the company 127*l.* 10*s.*, with interest at 4 per cent. from 20 March, 1900, but that direction was not to be acted upon until after the next general meeting of the company, and not then if credit should be taken in the balance-sheet for such moneys, and the same could be treated as a payment on account of dividend to be declared at such meeting. And on the counterclaim he ordered the plaintiffs within fourteen days after the said general meeting to repay to the company the amounts of the dividends paid to them respectively pursuant to the resolution of 20 March, 1900, with interest thereon at 4 per cent. from that date.

The defendant directors appealed.

Eve, K.C., and Ashton Cross, for the appellants:

There are two questions: first, whether the action can be maintained at all by these plaintiffs; and secondly, whether there is any liability in the directors to repay the dividend.

As to the first point, a shareholder who has participated in the dividend cannot maintain this action, for a person who has ratified and participated in an illegal act cannot sue on account of it. The plaintiffs here were cognisant of all the facts. The directors are entitled to an indemnity from the shareholders to whom the money was paid: *Moxham v. Grant* [1899] (2).

[VAUGHAN WILLIAMS, L.J.: The ground of that decision was that the directors and shareholders were not joint tort-feasors.]

The action cannot be maintained by the plaintiffs on behalf of all the shareholders: *Russell v. Wakefield Waterworks Co.* [1875] (3). The plaintiff Wedlake must be presumed to have known all the circumstances of the payment of this dividend: *Ramskill v. Edwards* [1885] (4); and Towers actually took part in distributing the dividend.

R. F. Norton, K.C., and Frank Evans, for the plaintiffs:

The plaintiff Wedlake was never consulted about the payment of this interim dividend, and he did not take any part in it. Towers was the secretary of the company, and acted under orders. They can as shareholders bring an action on behalf of themselves and the other shareholders to get the matter put right. It is not necessary that the action should be by the company: *Alexander v. Automatic Telephone Co.* [1900] (5). There is nothing in the circumstances of this case to prevent these plaintiffs from suing. Even although the plaintiffs have received part of the dividend which was improperly paid, they can maintain an action like this, a

(2) 6 Manson, 120; [1899] 1 Q. B. 480; 68 L. J. Q. B. 283; 80 L. T. 356; 47 W. R. 282. On app., 7 Manson, 65; [1900] 1 Q. B. 88; 69 L. J. Q. B. 97; 81 L. T. 431; 48 W. R. 130.

(3) L. R. 20 Eq. 474; 44 L. J. Ch. 496; 32 L. T. 685; 23 W. R. 887.

(4) 31 Ch. D. 100; 55 L. J. Ch. 81; 53 L. T. 949; 34 W. R. 96.

(5) [1900] 2 Ch. 56, 72; 69 L. J. Ch. 428, 434; 82 L. T. 400; 48 W. R. 546.

representative action, to make the other directors repay what they have improperly distributed as dividend, so that the capital of the company may be recouped what has been taken from it—they, themselves, of course, being ready to repay the shares of the dividend received by them: *In re Alexandra Palace Co.*[1882](6) and *In re Exchange Banking Co., Flitcroft's Case*[1882](1).

VAUGHAN WILLIAMS, L.J.: On the whole I think that the plaintiffs are not entitled to any relief here. It would not be very satisfactory if we had to determine this case ultimately upon the pleadings. I quite feel the force of what counsel said as to the allegations in paragraph 14 of the statement of claim, that the plaintiff Wedlake was never consulted as to, or took part in, the declaration of payment of the dividend, and I agree that there is no denial of that allegation in the statement of defence; but it does not seem to me that that disposes of the whole case—I mean, it does not dispose of the whole of the case, even if the allegation is taken as admitted by the defendants, because that allegation is quite consistent with Wedlake having received this dividend with full knowledge of all the facts. If that is so, the matters alleged in paragraph 14 do not in any way negative his incapacity to sue in this action. The truth, in all probability, is that, although Wedlake may not have been consulted as to the declaration and payment, he was perfectly well aware of all that was being done; and that is strongly confirmed by the fact that the counterclaim alleges in so many words that the plaintiffs took, and have ever since retained, the amount of the dividend on their then holdings, with full notice of all the facts relating thereto. I believe that that is true, not only because the plaintiffs, when they plead to the counterclaim, seem to me, on the face of the pleadings, to admit the truth of that, but also because when one turns to the minutes—and in particular the minute of the meeting of 14 September, 1900, at which Wedlake was present—I cannot doubt that he must have been perfectly well aware of all the facts connected with the declaration and payment of this dividend and the state of accounts at the time.

In that state of things, what ought to be done? There is no doubt that the payment of this interim dividend was an *ultra*

vires payment. I start with the assumption that one is bound to make, that if you have got an act done by a company which is *ultra vires*, no confirmation by shareholders—not even by every member of the company—can convert that which was *ultra vires* into something *intra vires*. It always must be *ultra vires*. As is pointed out in one or two of the cases, the result of that is that, if the company are plaintiffs, no amount of acquiescence or resolutions by the shareholders can form an answer to the action by the company for the reinstatement of things in the state in which they would have been but for the *ultra vires* act complained of. But, to my mind, it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. I am assuming in this case that this was one of those cases in which the facts were such that the plaintiffs ought to be able to sue in a representative action for the purpose of preventing things being done in reference to the company in which they are interested, and which might damnify the company by reason of their being *ultra vires*. I assume that an action, not only to prevent, but to remedy matters that have been done *ultra vires* is an action which can be brought in the form in which this action is brought; but, although that is so, my own opinion is that such an action has to be brought by the plaintiffs personally. It is an action which they cannot bring without having an interest. It is an action which a stranger could not bring. Under those circumstances, what is it that we have to ask ourselves here? If it be the fact, as I think it is, that these plaintiffs knew of all these things which had been done, and received the dividends with knowledge of all the facts, and then brought this action with the money still really in their pockets, ought they to be allowed to bring this action, which, as I have pointed out, is to my mind an action which they can only bring in consequence of their personal interest in the matter? I think not. I think that an action could not be brought by an individual shareholder complaining of a matter which is *ultra vires* if he himself had in his pocket, at the time he brought the action, the proceeds of that very *ultra vires* act. I think, in the same way, that it does not alter matters that he says he is suing on behalf of himself and others. I think that that which ought to make us say he cannot bring the action himself ought equally to make us say that he

ought not to be the peg upon which the action is to be hung for the benefit of others.

Assuming that to be so, what answer is sought to be made here? I think that counsel for the respondents put the only logical answer that could be put. They were bound to contend that the very wrongdoer himself, who had got the proceeds of the wrongdoing in his own pocket, might, if the matter was a matter which was *ultra vires*, sue as a plaintiff to have it put right, and bring his action against the other shareholders who had benefited by it, and compel them to restore the capital which had been wrongfully paid out to them. I do not think that is right; and if that is not right, I think that the return of the capital received by the plaintiff in the course of the trial of the action does not make things any better. Admittedly these dividends were in the pockets of these plaintiffs when they brought the action; and they were still in their pockets when the action came to be tried. It is quite true that in the course of the trial they said they were prepared to pay this money back, that they were content that judgment should go against them personally in respect of it; but I do not think that would make an action good which was not otherwise a good action in its inception.

I must say that in this particular case there is a strong inclination in my mind not to give the plaintiffs the relief for which they ask, because, starting with the fact that capital had been distributed in the payment of this interim dividend, that fact had been recognised by the company and by the shareholders. It appears on the face of the balance-sheet, and they were minded to replace this capital, and had every prospect of doing so even out of the very current year's profits. Under these circumstances this action was wholly unnecessary and wholly uncalled for. It seems to me that the Court is not bound, when it sees that this *ultra vires* act is in course of being put right, and will very shortly be put right, to give relief of this sort to plaintiffs who have acquiesced in the wrong, and who have got part of the proceeds of the wrong in their pockets.

Under those circumstances I think this appeal ought to succeed.

STIRLING, L.J.: I also think that this appeal ought to succeed. I desire to rest my decision on the particular facts in this case, and

to abstain from laying down, so far as possible, any general rule on the question whether a shareholder who has been party to the payment of a dividend out of capital, or who has taken his dividend with knowledge of all the facts, can or cannot come to the Court afterwards and complain that the dividend has been paid out of capital, and seek to make either the directors, or his fellow-shareholders, restore what they have paid or received with notice that the dividend had been improperly paid.

[His Lordship referred to the facts as to the payment of the interim dividend of 127*l.* 10*s.*, and as to the balance-sheets for the years ending 31 July, 1899, and 31 July, 1900.] He continued: The balance-sheet of 31 July, 1900, was submitted to the shareholders, and was approved by them. Therefore it stands recorded on the face of the transactions of the company that a dividend had been improperly paid, and in any future dealing, supposing it was honest, the debit against the company has to be wiped out before any dividend can be properly paid. That being so, in July, 1901, a further profit was made, and on 31 July, 1902, the debit balance was nearly wiped out, but not enough was made to pay a dividend. Then this took place in March, 1908: Towers is dismissed from his office; and thereupon he and Wedlake bring this action, and they charge that an *ultra vires* act had been committed, and that the 127*l.* 10*s.* which had been made and had been lost by the company ought to be brought back into the coffers of the company; and that is the object of the action.

Now, it is proved beyond all contradiction by documents under the hand of Towers that he was perfectly well aware of the circumstances in which the dividend was paid. It is true that Wedlake was not in the same position, but I think, having regard to the admission which he made by not denying the allegation in the counterclaim that he received his dividend with full notice of all the facts relating thereto, and the fact that he submitted to judgment against himself on that footing, and also the high probabilities of the case, that, inasmuch as he did not choose to go into the box and deny it, we ought to assume that he, like his partner, Towers, knew the facts under which the dividend was declared and paid. The action in form is by the plaintiffs against the company and

the other shareholders, and we have here all the shareholders of the company. I think this is a form of action which in certain circumstances may be maintained. That a shareholder who had received a dividend without knowing anything of the illegality of it might maintain such an action I do not doubt. Whether he ought not to return what he had received in respect of dividend is another question, and that might depend upon whether he had notice at the time when he took it of the acts complained of. Why is it that this form of action is allowed? The proper plaintiff, *primâ facie*, where it is sought to bring back the property of the company into its own coffers, is the company itself. But there are exceptions to that rule, and with respect to the reason for the exceptions Sir GEORGE JESSEL, in *Russell v. Wakefield Waterworks Co.* (8), says this: "The exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice." Now this is a case, to begin with, in which no one suggests any fraud or dishonesty on the part of the directors or any one else. The directors who paid this dividend made a mistake, but no one charges anything more than a mistake. Everything was perfectly open. The fact of the payment of the dividend was disclosed by the balance-sheet of 1900, the first balance-sheet which was submitted to the shareholders after the payment of the dividend. Further, the subsequent dealings seem to show that the company did not intend to overlook the fact that this dividend had been improperly paid, and that there was no intention on the part of any one to do anything other than that which was right and to make good the deficiency in the capital of the company which had been created by the payment of that dividend. That seems to me to be the result of the subsequent balance-sheets. Moreover, what do we find the plaintiffs themselves doing? They acquiesce in this course being taken by the company from 14 September, 1900, when they certainly knew of what had been done, down to March, 1908, when this action was brought. It does not seem to have ever been suggested by any one that an action should be brought by the company to recover this deficiency of the capital; and I think we ought to infer that what commended itself to the plaintiffs, as well as to the other shareholders, was to go on in the same course as before—the company was prosperous; it was wiping out year by

year a great part of the deficiency—and ultimately, when the whole deficiency, including this deficiency in capital, had been replaced, to pay a proper dividend, and not until then. I do not think that any necessity has been shown, looking at all the circumstances of the case, for the intervention of the Court to compel the payment of this small sum—for such it was, really—and, in truth, Mr. Justice BYRNE, although he gave a judgment in favour of the plaintiffs, was so far from desiring to press that, that he directed it not to be enforced, in order to see what might be the result of the further trading and whether the deficiency in capital would not be wiped out in the ordinary course.

I think, on the whole, that justice would have been done if this action had been dismissed on the ground of the personal conduct of the plaintiffs.

COZENS-HARDY, L.J.: I am of the same opinion. In my view, there is no doubt that the payment of this dividend was an illegal payment, because it was a payment out of capital. Nor do I think that it can be contested, and it certainly was not contested by the appellants, that a transaction of that kind cannot be ratified by the shareholders. But, in order to consider what is relevant in this case, one must go further. An action in respect of or arising out of an *ultra vires* transaction ought properly to be brought by the company, but it has been long well established that there are cases in which such an action may be maintained by a shareholder suing on behalf of himself and all other shareholders against the company as defendant. I will not pause to consider under what particular circumstances such an action may be maintained. I assume that this is one of those cases in which such an action may be maintained—I mean in point of form; but I think it is equally clear that the action cannot be maintained by a common informer. A plaintiff in an action in this form must be a person who is really interested. When you get that fact clearly established, it seems to me impossible to avoid taking the next step, that all personal exceptions against the individual plaintiff must be gone into and considered before relief can be granted. I have no intention of going through all the facts again, but I think it is clearly proved here, as it is certainly alleged by

the counterclaim, that both the plaintiffs took this dividend with full notice of all the facts relating thereto. It is also clear that they had the dividend, which they took with full notice that it was a payment out of capital, in their pockets at the date when this action was commenced.

Now can a shareholder who has, with full notice of all the material facts, received part of the capital of the company by way of dividend, and who still retains that money in his pocket, maintain an action against the directors who have paid the dividend? I think the true answer to that question is, that he cannot. It may be that there is no direct authority on the point; but the *dictum* of Lord Justice BRETT in *Flitcroft's Case* (1) is really, I think, very nearly in point. That was a case of the winding up of the company. It was a case where there had been an illegal payment of capital, and Lord Justice BRETT there says: "I think that there was no ratification at all, because the assent of the shareholders was procured by improper accounts, the untruthfulness of which the shareholders did not know. But suppose they had known it, I think that what was done was a breach of trust which they could not ratify. If they had with full knowledge assumed to ratify what was done, they could not individually have complained, but the shareholders are not the corporation." The view of Lord Justice BRETT was that shareholders who assumed to ratify could not have individually complained; and it seems to me to follow that a shareholder having the money in his pocket, which he knows is wrongfully there, ought not to be allowed to complain, and he cannot get any greater right of complaint because in form his action is an action by himself and all other the shareholders in the company. In fact, he must succeed by his own merits, and not by the merits of the other shareholders. Whether this action could have been maintained by these plaintiffs if, before action brought, they had repaid the amounts of the dividend which they had received, it is not necessary for us to decide. Speaking for myself, I doubt whether that repayment would have sufficed to put the plaintiffs in the right. Here, however, nothing of the kind happened. There is actually a judgment against the plaintiffs upon the counterclaim for payment of these sums. In my view, the judgment of the learned Judge in the action ought to be set

aside, the judgment on the counterclaim with costs being the only part of the order which can stand.

VAUGHAN WILLIAMS, L.J.: The only part of the order of the Court below which stands is that which relates to the counterclaim. The defendants to the counterclaim—that is, the plaintiffs—will have to pay the costs of that, but in the action and on the appeal there will be no costs at all on either side.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *Hannay & Hannay*,
South Shields, for the Appellants.
Smith, Rundall & Dods, agents for *H. Wilson Paton*,
Swansea, for the Respondents.

IN RE LETHEBY AND CHRISTOPHER, LIMITED,
JONES'S CASE.

1904, April 15. BUCKLEY, J.

Company—Articles of Association—Shares—Transfer—"Usual Common Form"
—Omission of Address of Transferor and Denoting Number of Share—
Materiality—Refusal to Register Transfer.

Where the articles of association of a company provide that all transfers of shares are to be in the "usual common form," a transfer will not be deemed to have failed to comply with that requirement merely because it omits matters which would be contained in a common form, but are wholly immaterial—for example, the address of the transferor and the denoting number of the share, where both of these are well known to the directors.

THIS was a motion by Edward James Jones that the above company by its directors or secretary might be ordered to register a transfer, dated 24 March, 1904, of a share numbered 5,998 in the capital of the company, from Edith Violetta Isley to the applicant as transferee thereof, and that the register of members of the company might be rectified accordingly.

The company was incorporated on 28 December, 1900, with a capital of 6,000*l.*, divided into 6,000 shares of 1*l.* each.

The articles of association provided:

Article 25. "Subject to the restrictions of these presents any

member may transfer all or any of his shares but every transfer must be in writing and in the usual common form and must be left at the office of the company accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the directors may require to prove the title of the intending transferor."

Article 28. "The directors may in their discretion and without assigning any reason therefor refuse to register the transfer of any share (not being a fully paid-up share) to any person whom they shall not approve as transferee. The directors may also refuse to register any transfer of shares whether fully paid up or not on which the company has a lien or of any shares which the holder has agreed with the company to hold for a period not then expired."

The company was a private company, and the whole of the shares except those held by the signatories of the memorandum who had subscribed for one share each were held by Messrs. H. T. Letheby and W. Christopher in equal shares. The signatories of the memorandum included the applicant, and also Miss E. V. Isley, who was therein described as of "Dormans Park Hotel, Dormans Park, Surrey, Spinster."

The company had issued debentures to a large amount, secured by a trust deed, the trustees of which had very large powers in the control of the company.

By article 79 the applicant was appointed one of the first managing directors of the company, but quarrelled with his co-directors, with the result that he was dismissed from his office. He thereupon brought an action against the company (*inter alia*) for wrongful dismissal. On 27 January, 1904, the action was settled on the following terms: "Plaintiff's costs to be paid by the defendant. Plaintiff to receive 600*l.* as agreed damages. Plaintiff's debentures (standing in the name of his wife) to be taken over at par and plaintiff to transfer the 1*l.* share which he held to the company or their nominee."

In 1904 the applicant purchased from Miss Isley the 1*l.* share for which she had signed the memorandum of association, and the share was assigned to him by a transfer dated 24 March, 1904. The transfer did not state the address of Miss Isley, nor the denoting number of the share transferred.

On 29 March, 1904, the applicant wrote to the company a letter in the following terms: "Enclosed herewith please find certificate No. 8 for one share in your Co. No. 5998, together with transfer duly executed by Miss Edith V. Isley to myself, and I shall be glad to receive a new certificate to myself at your convenience."

In the certificate which accompanied this letter Miss Isley was described as of "Dormans Park, in the county of Surrey."

The directors, acting on counsel's opinion, declined to register the transfer, on the ground that it was irregular in not stating the address of the transferor and the denoting number of the share transferred.

Astbury, K.C., and Hohler, for the applicant:

The applicant is entitled to have this transfer registered. The transfer is in the usual common form. The omission of the transferor's address and the denoting number of the share is wholly immaterial. There was not the least doubt as to the share which was intended to be transferred, and the directors knew of the transferor's address. Article 28 was never intended to apply to a case like the present.

Beddall, for the company:

The transfer does not comply with the articles which require transfers to be in the usual common form. The present transfer is not in that form. It is the universal practice to state in the transfer the address of the transferor. This is done in order that the company may give notice to the transferor that a transfer of his shares has been lodged, and thus prevent possible frauds. Here the directors knew that Miss Isley had left the address which appeared in the register, and they were not aware of her present address.

[*Astbury, K.C.*: I ask leave to amend the notice of motion by joining Miss Isley as a co-applicant.]

Even if that were done the directors would be entitled to refuse to register the transfer, as it does not contain the denoting number of the share transferred.

[BUCKLEY, J., referred to *In re International Contract Co., Ind's*

212 IN RE LETHEBY AND CHRISTOPHER, LIMITED, [MANSON,
Case [1872] (1), and *In re Financial Insurance Co., Bishop's Case*
[1869] (2).]

A transfer which does not state the denoting number of the share is not in the usual common form.

BUCKLEY, J., stated the facts, and continued: Under the articles the directors have no power to refuse to register this transfer except on certain terms. To give them that power the share must either be not fully paid up, or the company must have a lien upon it. Neither is here the case. They cannot, therefore, refuse registration under article 28. Section 22 of the Companies Act, 1862, makes shares freely transferable subject to the regulations. It is important that that free right of transfer should be preserved. With that view the Court will look at the regulations, and, unless they forbid it, will compel the directors to give effect to the transfer. Miss Isley had a right to transfer this share to Jones, provided she complied with article 25. All that that required was that the transfer should be in writing and in the usual common form. This transfer is in writing, and the only suggestion is that it is not in the usual common form because it is wanting in two particulars: first, that the transferor is not described as of any particular address; and secondly, that the share is not described by any denoting number. Miss Isley was a person who subscribed the memorandum of association for this one share, and she is there described as of "Dormans Park Hotel, Dormans Park, Surrey, Spinster," and she is also described on the register of members and in the share certificate as of the same address. With the transfer itself the transferee sent the certificate for this share. He wrote that he enclosed therewith "certificate No. 8 for one share in your Co. No. 5998, together with transfer duly executed from Miss Edith V. Isley to myself." Therefore he sent with the transfer the certificate which contained the transferor's address. There was not the smallest doubt who the transferor was, for she only held the one share, and she was the person described in the memorandum of association and the certificate.

(1) L. R. 7 Ch. 485; 41 L. J. Ch. 564; 26 L. T. 487; 20 W. R. 430.

(2) L. R. 7 Ch. 296, n.

The next objection is that no denoting number was given on the transfer. There again no difficulty arises, for she held no share other than the share numbered 5,998, and the certificate of that share was sent with the transfer. It is said that by reason of these defects the provisions of the articles were not complied with, and that the transfer was not in the usual common form. In my judgment the absence of the address and the number of the share was in the circumstances of the case wholly immaterial. In *Ind's Case* (1) it was said by Lord Justice MELLISH that the numbers of shares were simply directory for the purpose of enabling the title of particular persons to be traced, and that if a shareholder put wrong numbers in a transfer that would not prevent his shares from passing by the transfer. In *Bishop's Case* (2) Lord Justice SELWYN said that where there was no doubt whatever either of the numbers of the shares intended to be assigned or of the intention of the assignee to accept the shares, the circumstance of the numbers being inserted afterwards was perfectly immaterial. Therefore the number of the share is directory only, and if there is no other share belonging to the same member it will pass by a transfer which does not give the number; or if a wrong number is given, but it is clear that the transferor must have meant to deal with a particular share, the absence of the number is immaterial. Is a transfer not in the usual common form because it omits matters which are in common form but which are wholly immaterial? In my judgment it is not. Article 25 means that in everything which is material the transfer must be in the usual common form. It does not mean that it is bad if the *i*'s are not properly dotted and the *t*'s are not properly crossed. Under the circumstances I think Jones is entitled to have the transfer registered. I cannot deprive him of the advantage which he has obtained by the compromise, and I make the order which is asked for. As a matter of form I will join Miss Isley as a co-applicant.

Solicitors: *A. W. Bartlett*, for the Applicant.
G. H. Daniell, for the Company.

IN RE LAKE GEORGE MINES, LIMITED.

1904, February 9. BYRNE, J. (in Chambers).

Company—Winding up by Court—Documents containing Information obtained by Official Receiver—"Property of the Company"—Subsequent Appointment of Liquidator—Right to Documents—Companies (Winding-up) Rules, 1903, Rules 53 and 144.

Where, in the case of a company ordered to be wound up by the Court, the Official Receiver has, under Rule 53 of the Companies (Winding-up) Rules, 1903, obtained information from officers of the company, the notes, memoranda, or other documents containing such information are not the "property of the company" within Rule 144 (1) which the Official Receiver is bound to put into the possession of a liquidator subsequently appointed, and the information so obtained cannot in the absence of evidence be said to be "information respecting the estate and affairs of the company . . . necessary or conducive to the due discharge of the duties of the liquidator" within Rule 144 (3), which it is the duty of the Official Receiver, if so requested by the liquidator, to communicate to such liquidator.

Semble, the Court may in its discretion, upon an application supported by sufficient evidence, direct the Official Receiver as its officer to produce or hand over to the liquidator the documents containing such information.

THE Lake George Mines, Limited, was on 6 February, 1901, ordered to be wound up by the Court. Shortly afterwards, in accordance with the usual practice, the Official Receiver had interviews with directors and officers of the company in reference to the affairs of the company.

He had in his custody notes and memoranda of what passed at these interviews, and also a number of documents on his private file upon which he had based his observations to shareholders and creditors of the company and his report to the Court.

Robert Warner, who was not one of the Official Receivers, was subsequently appointed liquidator, and he commenced an action, in the name of the company, against certain of the directors and other persons, some of them being persons with whom the Official Receiver had had interviews.

In January, 1904, the liquidator's solicitors wrote to the Official Receiver informing him that the trial of the action had been fixed for 15 February, 1904, and stating that they had been advised by counsel to call upon the Official Receiver to inform them who were the officers of the company who had attended before him and had furnished the information upon which his report and observations

were based, what the nature of that information was, and if in writing to permit the solicitors to inspect and make copies of the same and of any memoranda made by the Official Receiver's department in respect of any information so obtained.

In reply, the Official Receiver stated that he had in his possession a number of notes and memoranda of interviews with the secretary and officers of the company, some of which only were signed; that the same had been made for his personal use, and that it was not the practice of his department to use such notes and memoranda against defendants in proceedings for misfeasance; and that he declined to produce the notes and documents except under an express order of the Court after both parties to the action had been heard.

The liquidator thereupon took out this summons for an order that the Official Receiver should hand over to him the original notes or memoranda of interviews with the secretary and officers of the company, whether signed or not, and any other document or documents or papers in the possession of the Official Receiver relating to the company, or in the alternative for an order that the Official Receiver should supply to the liquidator, or his solicitors, copies of such notes and memoranda or of other documents and papers.

The summons was adjourned to BYRNE, J., and now came on for hearing by him in Chambers.

The liquidator was represented by his solicitors.

R. J. Parker, for the Official Receiver.

BYRNE, J.: This is a very important application. It has been argued before me as a matter of principle whether, when, as in this case, a liquidator has been appointed in the place of the Official Receiver, the Official Receiver is bound to hand over or produce to the liquidator all documents which have come into his possession as Official Receiver. It is admitted that the documents in respect of which this application is made have come into existence and into the Official Receiver's possession whilst he was exercising his powers under what is now Rule 53 (2) of the Companies (Winding-up) Rules, 1903, which is as follows: "The Official Receiver may from time to time hold personal interviews with every such person for

the purpose of investigating the company's affairs, and it shall be the duty of every such person to attend on the Official Receiver at such time and place as the Official Receiver may appoint and give the Official Receiver all information that he may require." From the information thus obtained the Official Receiver, acting in that capacity, prepares a report for the Court. This information is not given on oath, and it has been stated before me that it has never been the practice to use the information on misfeasance proceedings, although the information has sometimes been made use of in public examinations when the person under examination has been asked whether he has not previously made an inconsistent statement to the Official Receiver.

The duty of the Official Receiver on the appointment of another person as liquidator is pointed out in Rule 144, which provides by sub-Rule (1) that "the Official Receiver shall forthwith put the liquidator into possession of all property of the company of which the Official Receiver may have custody," and by sub-Rule 3 that "it shall be the duty of the Official Receiver, if so requested by the liquidator, to communicate to the liquidator all such information respecting the estate and affairs of the company as may be necessary or conducive to the due discharge of the duties of the liquidator." The documents in the present case are clearly not the property of the company within the meaning of Rule 144 (1). They have come into the hands of the Official Receiver by virtue of his official position as Official Receiver, so that Rule 144 (3) is the only provision, if there is any, under which the liquidator could require the production of the documents in question.

No evidence has been adduced in support of the application, and I have no materials before me enabling me to say that it is necessary or conducive to the discharge of the liquidator's duties that he should have the information afforded by these documents. In the absence of evidence, I cannot say whether this is a case in which the Court might in its discretion direct its officer, the Official Receiver, to produce or hand over the documents to the liquidator. Such a direction might perhaps be given on an application supported by sufficient evidence. Another point to which perhaps reference should be made is that the person bringing the action may subpoena the Official Receiver to attend as a witness at the trial and produce

documents in his possession. But, on the other hand, it must be remembered that the person subpoenaed may claim privilege as an officer of a public department, on the ground that production will be contrary to public interest, or as an officer of the Court.

I cannot say that the Official Receiver has not complied with Rule 144 (8). There appears to be no reason for acceding to the application, and I dismiss it with costs. I give leave to appeal; and as the matter is one of urgency, inasmuch as the action is very shortly coming on for trial, I will certify that I do not require any further argument.

[The applicant gave notice of appeal; but he did not appear, and the appeal was dismissed with costs.]

Solicitors: *H. G. Campion & Co.*, for the Applicant.

Solicitor to the Board of Trade, for the Official Receiver.

IN RE BROWN AND GREGORY, LIMITED,
ANDREWS v. BROWN AND GREGORY, LIMITED.

1904, February 11, 27. BYRNE, J.

Company—Debentures—Transfer to Trustee for Creditors—Transferor Indebted to Company—Debenture-holders Action—Money Available for Dividend—Claim by Trustee—Cross-claim by Company.

Where debentures the conditions of each of which were that the moneys thereby secured were to be paid without regard to any equities between the company and the original or any intermediate holder, and that the registered holder was to be treated as exclusively entitled to the benefit of the debenture, and that the company was not bound to enter on the register notice of any trust or to recognise any right in any other person, were by deed assigned, by persons who were indebted to the company, to a trustee for creditors, and the trustee was entered on the register as the holder of the debentures, and neither the company nor the other debenture-holders had come in under the deed, it was held that the trustee, being simply general assignee in trust for creditors, took the debentures subject to the same equities as his assignors were subject to, and that, consequently, notwithstanding the conditions on the debentures, he was not entitled to share in a fund in Court in a debenture-holders' action, which was available for dividend, without bringing into account the debt due to the company by his transferors.

In re Goy & Co., Farmer v. Goy & Co. (1), distinguished.

THIS was the further consideration of a debenture-holders' action in which there was a fund in Court that was now available for distribution in payment of a dividend to the debenture-holders.

In 1898 Brown and Gregory, Limited, had issued to Samuel Smith certain debentures for 100*l.* each, by which the company bound itself to pay the moneys secured to S. Smith or the registered holder for the time being, and charged all its property with such payments, subject to the conditions indorsed on the debentures.

Amongst the conditions indorsed on each debenture were the following:

"2. The principal moneys bonus and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder of this debenture."

(1) 8 *Manson*, 221; [1900] 2 *Ch.* 149, 153; 69 *L. J. Ch.* 481, 483; 83 *L. T.* 309; 48 *W. R.* 425.

"8. The receipt of the registered holder of this debenture, his executors or administrators, shall alone be a good discharge for the principal moneys and bonus hereby secured and the interest payable from time to time on the 100*l.* secured by the debenture."

"11. The registered holder hereof will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly, and the company shall not be bound to enter on the register notice of any trust or to recognise any right in any other person save as therein provided."

In January, 1902, the above-named action was commenced by the plaintiffs, on behalf of themselves and all other debenture-holders of the defendant company, for the usual accounts, for the sale of the property of the defendant company, and for division of the proceeds.

On 3 February, 1902, thirty of these debentures, which were standing in the name of Samuel Smith alone, but which his Lordship was satisfied belonged beneficially to the firm of Samuel Smith & Co., of which S. Smith was a member, were assigned to A. C. Palmer by a deed, whereby, except onerous property and the separate property of S. Smith, all the joint and several property of the firm of Samuel Smith & Co. and its members was assigned to A. C. Palmer as trustee for the creditors of the firm. A. C. Palmer was subsequently entered on the register as the holder of the thirty debentures. On 22 February, 1902, judgment in the debenture-holders' action was given in the usual form. In July, 1902, the Master certified that the sum of 1,666*l.* 8*s.* 11*d.* was due from Samuel Smith or his firm to the defendant company, and that the debt so owing formed part of the property of the company, subject to the debentures. The debt was, as his Lordship found, as a fact due from the firm to the defendant company. Neither the defendant company nor the debenture-holders had come in under the creditors' trust deed. The action now came on on further consideration, and the question was raised whether A. C. Palmer, as assignee of the assets of the firm, was entitled to receive, out of the fund in Court available for distribution amongst the debenture-holders, dividends in respect of the thirty debentures that had been assigned to him, and of which he was the registered

holder, without first paying or bringing into account the debt of 1,666*l.* 8*s.* 11*d.* due to the company.

Rowden, K.C., and T. H. Watson, for the plaintiffs :

Before Palmer, as assignee of the firm of Samuel Smith & Co., can share in the dividends, he must either pay the debt due from the firm to the company or else bring the same into account against anything he may receive by way of dividend.

The general principle applicable is stated in *In re Goy & Co., Farmer v. Goy & Co.* [1900] (1). Unlike, however, the assignee in that case, Palmer is not an independent transferee. As trustee for the creditors of the firm, and assignee of its assets, he can be in no better position than his assignor would have been in if he had not assigned the debentures, but had remained the registered holder. The company has a good cross-claim against Palmer in respect of the debt due to it by S. Smith or by the firm. He is not entitled to participate in the fund until he has paid the debt. He can in effect pay himself out of that debt: *In re Akerman, Akerman v. Akerman* [1891] (2); *In re Watson, Turner v. Watson* [1896] (3); and *In re Auriferous Properties, Limited* (No. 2) [1898] (4). Assuming that Palmer is in the same position as his assignor, it does not matter that he cannot be sued by the plaintiffs: *In re Akerman* (2). In that case there was no right of action at all. According to the observations of STIRLING, J., in *In re Goy & Co.* (1), the dividends on the debentures can be set off against the whole debt. Palmer, as trustee for the creditors, is the person to pay the debt, and he is also the registered holder of the debentures. Under the circumstances conditions 2 and 11 of the debentures have no application.

Norton, K.C., and M. M. Macnaghten, for Palmer, as trustee of the creditors' deed :

Palmer, being the registered holder of the debentures in question, is, under the conditions indorsed on the debentures, exclusively

(2) [1891] 3 Ch. 212; 61 L. J. Ch. 34; 65 L. T. 194; 40 W. R. 12.

(3) [1896] 1 Ch. 925; 65 L. J. Ch. 553; 74 L. T. 453; 44 W. R. 571.

(4) 5 Manson, 260; [1898] 2 Ch. 428; 67 L. J. Ch. 574; 79 L. T. 71; 47 W. R. 75.

entitled to a dividend out of the fund without regard to the debt owing by his assignor. He owes nothing to the company or to the other debenture-holders, and is not bound to bring the debt into account. The most the plaintiffs are entitled to from Palmer is a dividend on the firm's estate in respect of the debt, and they have no right to any dividend until the money due on the debentures has been paid. They cannot set off a dividend against a debt, but only a debt against a debt, or a dividend against a dividend. The observations of STIRLING, J., in *In re Goy & Co.* (1), have no application to the distribution of a creditor's trust fund. Except for those observations, which are merely *obiter*, there is no authority on this point. In *In re Akerman* (2) the executors merely retained a statute-barred debt, and they were the persons who could sue for it. *In re Auriferous Properties, Limited* (No. 2) (4), was the case of a winding up of a company. Money was due for calls upon shares to the liquidator as such, and it was held that the liquidator could retain the payment in respect of the dividend until the calls were paid.

T. H. Watson, in reply :

The principle applicable here is clearly stated by STIRLING, J., in *In re Goy & Co.* (1), and that statement was made after full consideration of *In re Akerman* (2), *In re Watson* (3), and *In re Auriferous Properties, Limited* (No. 2) (4).

Cur. adv. vult.

February 27.

BYRNE, J., read the following judgment: There is a fund in Court in a debenture-holders' action now available for distribution in payment of a dividend in respect of the amounts due on the debentures.

Palmer is entitled as assignee to certain of these debentures under a deed dated 3 February, 1902, whereby, except onerous property and the separate property belonging to Samuel Smith, all the joint and several property of the firm of Samuel Smith and its members was assigned to him as trustee for creditors. I have only been able to get at the actual facts after a careful perusal not only of the Master's certificate, but also of the evidence upon which it was founded, because there was a certain ambiguity upon the certificate,

and because there was some colour for a plausible argument arising out of the fact that the debentures were standing in the name of Smith alone, and that Smith had made another assignment also to Palmer of his separate estate; but I am satisfied that the debentures belonged beneficially to the firm, and that Palmer claims the debentures as assignee of the firm's assets.

The Master's certificate also finds that part of the property subject to the debentures consists of a debt of 1,666*l.* 8*s.* 11*d.* due from the defendant Samuel Smith or his firm, and I find as a fact that it was due from the firm. I can so far clear the way by stating that I am satisfied that Palmer's title to the debentures depends, as he himself claims, upon the assignment from the firm, and that the debt was a debt due (as Palmer also proves) from the firm to the company. There is no question of set-off arising, and I do not see that there is any difference in point of principle because the item of property charged happens to be a debt rather than some other item—as, for instance, a sum of Consols in the name of Palmer as trustee by virtue of the assignment. The contention on the part of the other debenture-holders is that Palmer cannot as assignee share in the dividend without paying or bringing into account the whole amount of the debt.

There is no doubt as to the general principle applicable. It is stated by Mr. Justice STIRLING in the case of *In re Goy & Co.* (1): "It has been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he may be bound to contribute to the same fund. Under such circumstances the Court in effect says to the person claiming to be paid, 'You have in your hands that which is applicable to the payment—pay yourself out of that.' This has been done on the distribution of the residuary estate of a testator where a person entitled to a share is also indebted to the estate: *Willes v. Greenhill* [1860] (5); *In re Akerman* (2); *In re Watson* (3). Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid: *In re Auriferous Properties, Limited* (No. 2) (4). In

(5) 29 Beav. 376; 30 L. J. Ch. 808; 9 W. R. 217.

Ex parte Theys [1884] (6), Cotton, L.J., said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled." It is argued on behalf of Palmer that he is in the position of holder of the debentures, that he owes nothing to the company, and that therefore the doctrine I have referred to does not apply:

When the facts are arrived at, the real question resolves itself into this—namely, whether or not Palmer as assignee of the firm's assets can be in a better position than that in which the firm would have been if they had never assigned and had been the registered holders of the debentures. Palmer is entitled to be registered as owner of the debentures only by virtue of the assignment by Smith and his co-partners as trustee for them, subject to satisfying creditors who may execute the deed; and Smith and his co-partners are liable to pay the debt. In my opinion, Palmer as assignee is in no better position than his assignors, being simply general assignee in trust for creditors (neither the company nor the debenture-holders having come in under the deed of assignment), and he can only be entitled subject to the same equities as his assignors were subject to. He is not in the position of *bonâ fide* purchaser for value, as was the assignee in the case of *In re Goy & Co.* (1).

[His Lordship then referred to conditions 2 and 11 of the debenture, and continued:] This does not, in my opinion, prevent the company or the debenture-holders from insisting upon their right as against Palmer, just as they could have insisted against his assignors. He only holds under the deed as trustee for them as against those creditors who have not come in under the deed. I think Palmer must bring into account the 1,666*l.* 8*s.* 11*d.* before he can claim to share in any dividend. That means he cannot share in the amount now to be divided.

The right method of division appears to me to be to add 1,666*l.* 8*s.* 11*d.* for the purpose of computation to the amount available for division, and then to pay the other debenture-holders all they are entitled to upon that footing, so far as the actual fund will extend. If there should be any future distribution, the payment now made will be brought into account, regard being had to the then state of circumstances. I can easily imagine the rights being altered by

other events, as, for instance, by the company or the debenture-holders receiving any payment under the deed, there being a release contained in it by assenting creditors in the usual form.

Solicitors: *Collyer-Bristow, Hill, Curtis, Dods & Booth*, agents for *Stone, Simpson & Mason*, Tunbridge Wells, for the Plaintiffs.

James, Mellor & Coleman, for Palmer.

IN RE GLASDIR COPPER MINES, LIMITED, ENGLISH
ELECTRO-METALLURGICAL CO. v. GLASDIR
COPPER MINES, LIMITED.

1904, March 7, 19. JOYCE, J.

Company—Landlord and Tenant—Tenant's Fixtures—Mortgagee—Removal after Forfeiture of Lease—Debenture-holders.

Where a tenant surrenders his lease to the landlord, a mortgagee or purchaser from the tenant has a right to remove fixtures within a reasonable time after the surrender. So where a company forfeits a lease by passing a resolution for a voluntary winding up, in which resolution debenture-holders do not concur, the latter have a similar right to remove fixtures within a reasonable time afterwards.

Pugh v. Arton (1) questioned.

In June, 1896, the defendant company issued debentures which, charged with the payment of the moneys, advanced its undertaking and property present and future as a floating security.

In July, 1896, the company took a lease from John Vaughan of a copper mine, which lease provided that in the event of the company going into liquidation the term should cease and determine, but not as regards the right of the lessor to enforce the covenants, and there was also a power to re-enter.

In June, 1900, Vaughan died, leaving his widow sole executrix, and by his will the reversion on the lease became vested in her.

Subsequently the present action was commenced by the debenture-holders to enforce their security, and by an order made in the action on 8 February, 1901, a receiver and manager was appointed of the property of the company, and in June, 1903, a petition to

(1) L. R. 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865; 17 W. R. 984.

wind up the company was presented, but no order was made upon it.

On 13 July, 1908, an application was made in the action by the debenture-holders that the plant and fixtures might be sold by the receiver, and that he might be at liberty to remove the same. That summons was served on Mrs. Vaughan, who appeared thereon by her solicitor, and was disposed of on 20 August, when leave was given to the receiver to sell the fixtures, it being stated in the order that Mrs. Vaughan claimed no interest therein.

On 16 October the company passed an extraordinary resolution for voluntarily winding up, and on 26 November the receiver issued advertisements for the sale of the fixtures, which fact was known to Mrs. Vaughan.

On 18 November Mrs. Vaughan's solicitor wrote to the receiver demanding on behalf of his client possession of the premises comprised in the lease, and on 17 November Mrs. Vaughan served the plaintiffs and defendants in the action with notice of the motion now before the Court, which raised the question as to the right of the applicant to the tenant's fixtures in the possession of the receiver.

A. F. Peterson, for the applicant:

Tenant's fixtures must be removed before the expiration of the term, or within such time afterwards as the tenant may properly be deemed to be the tenant of the premises: *Weeton v. Woodcock* [1840] (2), *Pugh v. Arton* [1869] (1), and *Barff v. Probyn* [1895] (3).

Frank Wright (*Hughes, K.C.*, with him), for the debenture-holders:

Where there is an agreement in the lease that the tenant shall be at liberty to remove fixtures, that gives him a reasonable time after the expiration of the lease within which to remove them: *Fawcett's Landlord and Tenant* (2nd ed.), p. 493; and it is immaterial whether the agreement is in the lease or elsewhere. The company could not by going into liquidation prejudice the right of its mortgagees to remove the fixtures. It is settled that a

(2) 7 M. & W. 14; 10 L. J. Ex. 183.

(3) 64 L. J. Q. B. 557; 73 L. T. 118.

surrender by a lessee cannot affect the rights of third parties and cannot therefore prejudice the right of a mortgagee to remove fixtures if he does so within a reasonable time: *Fawcett's Landlord and Tenant* (2nd ed.), p. 460, and *Saint v. Pilley* [1875] (4). Assuming that the receiver is allowed a reasonable time for removing the fixtures, the time does not begin to run from the date of the resolution for winding up, but only from the time when the lessor notifies his option to avoid the lease.

A. Adams, for the receiver, adopted the last argument.

A. F. Peterson replied.

Cur. adv. vult.

March 19.

JOYCE, J.: The question in this case is with reference to certain trade fixtures—that is to say, certain articles which, though annexed to the soil, do not thereby become the property of the owner of the freehold, but are removable by the tenant. The question I have to decide is whether these articles may be removed by a purchaser or mortgagee from the lessee after the lease has been determined by forfeiture. [His Lordship stated the facts as above set out and came to the conclusion that the lease was not determined until the receipt of the letter of 18 November, and continued as follows:] The applicant's contention is that, the receiver not now holding the premises “under a right still to consider himself as tenant”—the words used in *Weeton v. Woodcock* (2) and *Mackintosh v. Trotter* [1838] (5)—the landlord was entitled to re-enter, and that the interest of the receiver and of the debenture-holders is at an end.

Upon the rule laid down by those two cases I observe that Lord Justice THESIGER, in delivering the judgment of the Court of Appeal in *In re Roberts, Ex parte Brook* [1878] (6), said: “It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe that, as regards the rule laid down in *Weeton v. Woodcock* (2), the difficulty which we feel in understanding its exact meaning was shared by the Court of

(4) L. R. 10 Ex. 137; 44 L. J. Ex. 33; 33 L. T. 93; 23 W. R. 753.

(5) 3 M. & W. 184.

(6) 10 Ch. D. 100, 109; 48 L. J. Bk. 22; 39 L. T. 458; 27 W. R. 255.

Common Pleas, as stated by Mr. Justice WILLES in delivering the judgment of that Court in *Leader v. Homewood* [1858] (7)"; and he goes on to say, "It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy." Then he says that the case before them is a different case, and that at all events the rule did not apply to that case.

Now, for the purpose of determining the question here, it appears to me that I have not to decide whether, as is stated in some of the books or as is suggested by Mr. Justice NORTH in *Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.* [1892] (8), no property at all in the fixtures vests in the landlord until the term comes to an end, or whether the property in the fixtures does *sub modo* vest in the landlord when they are affixed, and the tenant retains only a power coupled with an interest. However this may be, it is well settled that where the tenant, the lessee, surrenders his interest to the landlord, that does not deprive a mortgagee or purchaser from the lessee of the rights he then possessed in reference to fixtures situated as these are, and that he still retains the right to remove them during a reasonable time. The authorities for that are *London and Westminster Loan and Discount Co. v. Drake* [1859] (9) and *Saint v. Pilley* (4); and there are other cases. Here the passing of the extraordinary resolution was a voluntary act on the part of the lessees, in which the mortgagees did not concur, and therefore the passing of such resolution, in my opinion, cannot vest the absolute property in chattels belonging to the mortgagees in the reversioner or take away their power to remove

(7) 5 C. B. (N.S.) 546, 553; 27 L. J. C. P. 316; 4 Jur. (N.S.) 1062.

(8) [1892] 1 Ch. 415; 61 L. J. Ch. 227; 66 L. T. 108; 40 W. R. 280.

(9) 6 C. B. (N.S.) 798; 28 L. J. C. P. 297; 7 W. R. 611; 5 Jur. (N.S.) 1407.

any more than such power or such right, whatever it may be, would be taken away in the case of the surrender of a lease by the lessee.

I was properly pressed with the case of *Pugh v. Arton* (1), before Vice-Chancellor MALINS, where it was held, according to the head-note, that in the absence of special contract tenant's fixtures cannot be removed after the termination of the lease, whether the lease determines by the effluxion of time or by re-entry on forfeiture. In my opinion, that head-note goes beyond the decision, and is not in accordance with the law. That may be true so far as concerns a power to remove by the tenant himself, though I trust that the Court of Appeal, whenever the case comes to be discussed there, will come to a different conclusion. But at all events this only concerns the tenant himself, and has nothing to do with the case of a mortgagee or purchaser from the tenant before the forfeiture accrues; and in the case of *Pugh v. Arton* (1) the person who was claiming the fixtures, and whose claim was disallowed, was a person whose only claim was as a volunteer, and the claim was under and by virtue of an assignment from the lessee, which assignment was in itself the act of forfeiture. In my opinion, the authorities enable me to decide this case in a way which is consonant with reason and justice, and I therefore hold that the mortgagees, the debenture-holders, have a reasonable time within which to remove the fixtures.

Solicitors : *Wilding Jones*, for the Applicant.

Goldberg, Barrett & Newall, for the Mortgagees.

Godden, Son & Holme, for the Receiver.

IN RE REIS, EX PARTE CLOUGH.

1904, March 11, 15, 16; May 17. C. A. VAUGHAN WILLIAMS,
STIRLING, AND COZENS-HARDY, L.JJ.

Bankruptcy—Marriage Settlement—Covenant by Husband to Settle After-acquired Property except Business Assets—Fraudulent Conveyance—Vagueness—Release by Discharge in Bankruptcy—Assignment of Furniture—Registration—Act of Bankruptcy—Notice of Suspension—Bankruptcy Act, 1869, ss. 12, 31, and 49—Bills of Sale Act, 1878, s. 4—Bankruptcy Act, 1883, ss. 47 and 49.

The debtor, an outside broker, informed each of his Stock Exchange creditors that he would have difficulty in meeting his payments on pay day, and gave each of them permission to close his account earlier than he could otherwise have done. The debtor had other creditors, to whom no reference was made:—

Held, by the Court of Appeal (reversing WRIGHT, J.), that the debtor had not given notice of suspension amounting to an act of bankruptcy within the Bankruptcy Act, 1883, s. 4, sub-s. 1 (h).

The rule laid down in *Crook v. Morley* (1) applied; and *In re Scott, Ex parte Scott* (2), and *Hill's Trustee v. Rowlands* (3), approved.

Held, also, by WRIGHT, J. (and not dissented from by the Court of Appeal), that, for the purposes of section 47, sub-section 2, of the Bankruptcy Act, 1883, a debtor is to be deemed to "become bankrupt" at the date on which the bankruptcy is to be deemed to have commenced according to the terms of section 43.

A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not fraudulent and void as against creditors under 13 Eliz. c. 5.

Per VAUGHAN WILLIAMS, L.J.—*In re Clint, Ex parte Bolland* (4), is no longer to be treated as an authority on this point.

Such a covenant is not too vague and uncertain to be enforced.

Lewis v. Madocks (5) followed.

The husband is not released from such a covenant by his becoming bankrupt and obtaining his discharge under the Bankruptcy Act, 1869, s. 49.

Collyer v. Isaacs (6) and *Hardy v. Fothergill* (7) distinguished.

An assignment to the settlement trustees of personal chattels in pursuance

(1) 8 Morr. 227; [1891] A. C. 316; 61 L. J. Q. B. 97; 65 L. T. 389.

(2) 3 Manson, 102; [1896] 1 Q. B. 619; 65 L. J. Q. B. 465; 74 L. T. 565; 44 W. R. 587.

(3) 3 Manson, 136; [1896] 2 Q. B. 124; 65 L. J. Q. B. 542; 74 L. T. 556.

(4) L. R. 17 Eq. 117; 43 L. J. Bk. 16; 29 L. T. 545; 22 W. R. 152.

(5) 8 Ves. 150; 17 Ves. 48; 7 R. R. 10.

(6) 19 Ch. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70.

(7) 13 App. Cas. 851, 358; 58 L. J. Q. B. 44, 46; 59 L. T. 273; 37 W. R. 177.

of such a covenant does not require registration under the Bills of Sale Act, 1878, being within the exception of a marriage settlement contained in section 4.

Wenman v. Lyon (8) and *Courcier v. Bardili* (9) followed.

THIS was an appeal from a decision of WRIGHT, J.

By an indenture of settlement dated 9 September, 1879, executed upon and in consideration of the marriage of the debtor, "a banker and bullion merchant," with his wife, the debtor settled certain property on his wife and children, and the debtor thereby covenanted to convey to the trustees all his after-acquired real and personal property, except business assets, to be held by the trustees upon trusts in favour of his wife and the children of the marriage.

The debtor was adjudicated bankrupt on 6 September, 1880, and obtained his discharge on 22 October, 1882. The trustees of the settlement lodged no proof under this bankruptcy in respect of the covenant contained in the settlement.

In 1894 the debtor was engaged in the business of an outside stockbroker, and by 1901 his profits exceeded 50,000*l.*, and he then invested some 17,000*l.* in purchasing and furnishing a freehold house, in which he resided with his wife and family. In April and May, 1903, he got into monetary difficulties, and on 26 May it was alleged that he committed an act of bankruptcy by giving notice to his creditors of suspension of payment under the Bankruptcy Act, 1883, s. 4 (*h*).

29 May, 1903, was pay day on the Stock Exchange, and on 26 May the debtor's solicitor saw two of his largest Stock Exchange creditors, Messrs Lumsden and Hart, and by the debtor's authority informed them that the debtor would have difficulties in meeting his liabilities on pay day, and that they were at liberty if they thought fit to close his accounts. They agreed to avail themselves of this permission, but one of them said that if there were any other Stock Exchange creditors they ought to have the same liberty, and this suggestion was carried out, a like permission being given to the other Stock Exchange creditors. There were other creditors of the debtor besides his Stock Exchange creditors to whom no reference was made and no communication given. Each broker

(8) [1891] 2 Q. B. 192; 60 L. J. Q. B. 663; 65 L. T. 136; 39 W. R. 519.

(9) 27 Sol. Journ. 276

acted for himself in closing the debtor's accounts, and each brought an action against him and recovered judgment for the amount due to him.

On 10 June, 1903, in pursuance of a written notice served on him by the trustees on 23 May, the debtor executed two deeds respectively conveying the house and assigning the furniture to the trustees of the settlement, the assignment of the furniture not being registered under the Bills of Sale Act, 1878. On 22 June, 1903, a judgment was recovered against him in an action by one of his Stock Exchange creditors commenced on 29 May. On 14 July a receiving order was made against him, the act of bankruptcy being non-compliance with a bankruptcy notice founded on the judgment, and on 23 July he was adjudicated bankrupt.

The trustee in the present bankruptcy claimed the house and furniture on various grounds, of which WRIGHT, J., only considered one, since he held that an act of bankruptcy had been committed by the bankrupt on 26 May, and that he became bankrupt within the meaning of section 47, sub-section 2, on that day, and that therefore the two deeds of 10 June were void as against the trustee in bankruptcy under that section; and on this view it became unnecessary for him to go into the other points.

The provisions of the Bankruptcy Act, 1883, referred to in the judgment of WRIGHT, J., and in the arguments in the Court of Appeal, and the provisions of the Bankruptcy Act, 1869, referred to in the arguments and judgments of the Court of Appeal, are stated or set out in the footnote (10).

(10) Bankruptcy Act, 1883, s. 4, sub-s. 1: "A debtor commits an act of bankruptcy . . . (h) if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

Section 43: "The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have

relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition."

Section 44 describes the property of the bankrupt divisible amongst his creditors.

Section 45, sub-section 1, restricts the right of an execution creditor, "unless he has completed the execution or attachment before the date of the receiving order, and before notice

WRIGHT, J., in the course of his judgment, after stating that he did not desire to deal with many of the points which had been argued, further than to say that he felt the greatest doubt whether

of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Section 46 deals with the duties of the sheriff as to goods taken in execution.

Section 47, sub-section 1: "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

Sub-section 2: "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the

property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

Section 48 avoids certain preferential conveyances, transfers, charges, payments, obligations, and proceedings if the person is adjudged bankrupt on a bankruptcy petition presented within three months after the date thereof.

Section 49: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy—(a) any payment by the bankrupt to any of his creditors; (b) any payment or delivery to the bankrupt; (c) any conveyance or assignment by the bankrupt for valuable consideration; (d) any contract, dealing, or transaction by or with the bankrupt for valuable consideration."

Bankruptcy Act, 1869, s. 12: "Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this Act. . . ."

Section 31: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save as aforesaid, all debts and

In re Clint, Ex parte Bolland [1878] (4), could be regarded as laying down as a general proposition that a covenant to settle after-acquired property must necessarily be bad upon the settlor's subsequent bankruptcy, continued: "My conclusion of fact is that there was an act of bankruptcy on 26 May. On 10 June the debtor transferred to the trustees of the marriage settlement the after-acquired property which he had covenanted by the marriage settlement to do. There was an act of bankruptcy after 10 June, on which a receiving order was made on 16 July, and the title of the trustee relates back to 26 May, that being the date at which an act of bankruptcy is proved to have been committed within three months next preceding the date of the presentation of the petition. The first question is, What meaning is to be attached to the words 'on his becoming bankrupt' in section 47, sub-section 2, of the Bankruptcy Act, 1883? It appears that there is no authority to guide me in the determination of that question. It was argued with great force that the words 'commencement of the bankruptcy' would have been used if that had been the critical period of time at which the line was to be drawn. On the other hand, it was said

liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy. . . . 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engage-

ment, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain, or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules or assessable only by a jury, or as matter of opinion."

Section 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts provable under the bankruptcy," with certain exceptions in favour of the Crown and public revenue.

that the particular words had been used in contradistinction to 'being adjudicated bankrupt.' I think some light is thrown upon the matter if regard be had to the terms of section 43, which fixes the time at which the bankruptcy is to be deemed to have commenced; and it seems to me to follow that at that period the debtor must be deemed to have become bankrupt.

"Then the second question raised is with reference to the meaning to be attached to the words 'before the property or money has been actually transferred or paid.' It seems to me that, by using the word 'actually' in connection with the words 'transferred or paid,' it was intended to exclude all questions of constructive transfers and payments. I think that sub-section 2 of section 47 is to apply unless there has been an actual legal transfer of the property, or an actual payment of the money. The very object of the words seems to me to be to draw the line somewhere short of the actual transfer or payment. I have been referred to *Ramsay v. Margrett* [1894] (11) and *In re Satterthwaite, Ex parte Trustee* [1895] (12). The first case was one in which the Court had to consider the effect of a receipt. In the second case there had been an actual transfer. But, in my opinion, section 47 of the Bankruptcy Act, 1883, can hardly be construed by reference to the Bills of Sale Act, 1882.

"The only question remaining for consideration is whether section 47 of the Bankruptcy Act, 1883, is modified, and if so to what extent, by section 49 of the same statute. I do not think that it could properly be argued that section 49 has overridden section 47. Section 49 appears on the face and the terms of it to apply only where section 47 does not apply; and, further, the enumeration of the cases to which section 49 is to be applicable does not include any description which is properly applicable to what took place when this property was transferred to the trustees. The transfer to the trustees was not a payment by the bankrupt to any of his creditors; it was not a payment or delivery by the bankrupt to any of his creditors; it was not a payment or delivery to the bankrupt; it was not a conveyance or assignment by the bankrupt for valuable consideration; and it was not a dealing or transaction

(11) 1 Manson, 184; [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788.

(12) 2 Manson, 52; 15 R. 242.

by or with the bankrupt for a valuable consideration. Therefore I think section 49 has no application.

"As I have said, I think it is undesirable to decide the difficult and doubtful questions which arise on other parts of the case, because it seems to me I am bound to come to the conclusion I have indicated on the question of fact, and to construe section 47 in the manner I have."

The trustees of the settlement appealed.

Horridge, K.C., and Muir Mackenzie, for the appellants:

WRIGHT, J., held that the debtor committed an available act of bankruptcy on 26 May, and therefore "became bankrupt" on that day within the meaning of section 47, sub-section 2, and if he was right in so holding, the other points taken by the trustees do not arise; but the conclusion of fact at which the Judge arrived on that point was wrong. What happened amounted to an authority given by, or on behalf of, the debtor to the particular Stock Exchange creditors to close his accounts because he might not be able to pay them on 29 May. That was not a notice that the debtor had suspended or was about to suspend payment of his debts within section 4, sub-section 1 (*h*), according to the rule stated in *Crook v. Morley* [1891] (1): see *Hill's Trustee v. Rowlands* [1896] (3), *In re Scott, Ex parte Scott* [1896] (2), *Davis v. Howard* [1890] (13), *In re Miller* [1900] (14), and *In re Mendelssohn, Ex parte Mendelssohn* [1902] (15). Nor do the words "becoming bankrupt" in section 47, sub-section 2, bear the interpretation placed on them by WRIGHT, J., but refer to adjudication. The leading authority bearing on this question is on different words: *In re Turner, Ex parte Attwater* [1877] (16), decided on section 1 of the Bills of Sale Act, 1854, where the words were "the time of such bankruptcy."

The language used in the group of sections 43 to 49 shows that "becoming bankrupt" in section 47 means actual adjudication. Thus section 45 expressly mentions "the commission of any

(13) 24 Q. B. D. 691; 59 L. J. Q. B. 133.

(14) 8 Manson, 1; [1901] 1 Q. B. 51; 70 L. J. Q. B. 1; 83 L. T. 545; 49 W. R. 65.

(15) 10 Manson, 9; [1903] 1 K. B. 216; 72 L. J. K. B. 106; 87 L. T. 721.

(16) 5 Ch. D. 27; 46 L. J. Bk. 41; 35 L. T. 917; 25 W. R. 328.

available act of bankruptcy by the debtor." *Stein v. Pope* [1902] (17) shows that the liability of the trustee in bankruptcy for rent does not accrue till adjudication. Section 47 likewise contemplates a determinate, not indeterminate, time. Section 49, which protects *bona fide* dealings without notice of an available act of bankruptcy, excludes settlements which are previously provided for by section 47, and there is no reason for this unless the avoidance of settlements is to be fixed by the date of adjudication. The two periods of two years and ten years in sub-section 1 of section 47 were intended to be definite, not indefinite, and the words "becoming bankrupt" must receive the same construction in each sub-section.

[The COURT intimated that they would hear the arguments for the respondent, the trustee in bankruptcy, on the only point decided by WRIGHT, J., before going into the other questions.]

H. Reed, K.C., A. J. David, and Adler, for the respondent :

It is clear on the authorities that WRIGHT, J., put the proper interpretation on the words "become bankrupt" in section 47, sub-section 2: *Fawcett v. Fearne* [1844] (18), *Smith v. Topping* [1838] (19), both decided on similar words in 6 Geo. 4, c. 16, s. 72; *Lyon v. Weldon* [1824] (20), decided on 21 Jac. 1, c. 19, s. 11; and *In re Turner, Ex parte Attwater* (16).

On the other point, looking at the whole evidence together, there was a sufficient notice by the debtor of an intention to suspend payment of his debts within section 4, sub-section 1 (*h*): *Crook v. Morley* (1) and *In re Lamb* [1887] (21), *In re Scott, Ex parte Scott* (2), and *In re Simonson & Co.* [1893] (22).

[*Horridge, K.C.*, referred to *In re Friedlander, Ex parte Oastler* [1884] (23).]

(17) 9 Manson, 125; [1902] 1 K. B. 595; 71 L. J. K. B. 322; 86 L. T. 283; 50 W. R. 374.

(18) 6 Q. B. 20; 13 L. J. Q. B. 300.

(19) 5 B. & Ad. 674; 3 L. J. K. B. 47; 2 N. & M. 421; 39 R. R. 616.

(20) 2 Bing. 334; 3 L. J. (o.s.) C. P. 27.

(21) 4 Morr. 25; 55 L. T. 817.

(22) 1 Manson, 30; [1894] 1 Q. B. 433; 63 L. J. Q. B. 242; 70 L. T. 32.

(23) 1 Morr. 207; 13 Q. B. D. 471; 54 L. J. Q. B. 23; 51 L. T. 309; 33 W. R. 126.

[The COURT intimated that they required to hear the arguments on the other points taken by the trustee in bankruptcy.]

As regards the validity of the settlement, the Judge was asked to treat the wife as party to the fraud.

[VAUGHAN WILLIAMS, L.J., referred to *Colombine v. Penhall* [1853] (24), and *In re Pennington* [1888] (25).]

The trustee does not, of course, suggest that she was in 1879 guilty of anything like a conspiracy; but the effect of the decision in *In re Clint, Ex parte Bolland* (4), may be to throw upon her the onus of showing that the settlement is valid.

[*Horridge, K.C.*, referred to *Fraser v. Thompson* [1859] (26).]

The Judge did not deal with this question, as he decided the case upon other points. The wife is not a party to the appeal, but the trustees sufficiently represent her, and she can have notice given to her if the Court thinks she ought to be here.

[VAUGHAN WILLIAMS, L.J.: It would be difficult to deal with the question in her absence. If the trustee in bankruptcy wants a declaration that the settlement is void under the statute 13 Eliz. c. 5, he should give her notice of appeal.]

The trustee can go upon another ground. The deeds of 10 June, 1903, constituted in effect a voluntary settlement within section 47 of the Bankruptcy Act, 1883, and are void as against the trustee in bankruptcy. The settlement of 1879 contained a covenant to assign, not an assignment, and it did not take effect until the property came into existence. In 1880 the covenantor became bankrupt, and in 1882 he got his discharge. The liability under the covenant was a matter of proof, and the effect of the discharge was to release the covenantor—Bankruptcy Act, 1869, ss. 31 and 49, and *Collyer v. Isaacs* [1881] (6), *Hardy v. Fothergill* [1888] (7), and

(24) 1 Sm. & G. 228.

(25) 5 Morr. 268; 59 L. T. 774.

(26) 1 Giff. 49; 33 L. T. (o.s.) 219; 2 Jur. (n.s.) 669.

In re Batey, Ex parte Neal [1880] (27).^{*} *Robinson v. Ommanney* [1883] (28) was a case under the law as it was before the Act of 1869—see Williams' Bankruptcy Practice (8th ed.), p. 123.

[VAUGHAN WILLIAMS, L.J., referred to *Tailby v. Official Receiver* [1888] (29).]

The result is that the operative deeds here were the deeds of 10 June, 1903, not the marriage settlement, and those deeds are purely voluntary and void as against the trustee under section 47, sub-section 1, and the trustee is entitled to succeed under sub-section 1, if not under sub-section 2: *In re Carter and Kenderdine's Contract* [1897] (30), approving *In re Brall, Ex parte Norton* [1893] (31).

As regards the meaning and intent of the settlement, the mere fact that an assignment or a covenant to assign after-acquired property is general does not necessarily make it bad: *In re Clarke, Coombe v. Carter* [1887] (32), and *Tailby v. Official Receiver* (29). In the latter case *In re Count D'Epineul, Tadman v. D'Epineul* [1882] (33), and *Belding v. Read* [1865] (34)—which went upon the ground that such an assignment must be invalid in the sense that it was too vague—were overruled. The Court, however, does not enforce such a covenant if it is too indefinite: *Clements v. Matthews* [1883] (35); and cases of that kind have not been overruled by *Tailby v. Official Receiver* (29), the decision in which was put by Lord Watson on the principle of *Holroyd v. Marshall* [1862] (36). A covenant such as this covenant would not be specifically enforced

(27) 14 Ch. D. 579; 43 L. T. 264; 28 W. R. 875.

(28) 23 Ch. D. 285; 52 L. J. Ch. 440; 49 L. T. 19; 31 W. R. 525.

(29) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(30) 4 Manson, 34; [1897] 1 Ch. 776; 66 L. J. Ch. 408; 76 L. T. 476; 45 W. R. 484.

(31) 10 Morr. 166; [1893] 2 Q. B. 381; 62 L. J. Q. B. 457; 69 L. T. 323; 41 W. R. 623.

(32) 36 Ch. D. 348; 56 L. J. Ch. 981; 57 L. T. 823; 36 W. R. 293.

(33) 20 Ch. D. 758; 51 L. J. Ch. 491; 46 L. T. 409; 30 W. R. 423.

(34) 3 H. & C. 955; 34 L. J. Ex. 212; 13 L. T. 66; 13 W. R. 867; 11 Jur. (N.S.) 547.

(35) 11 Q. B. D. 808; 52 L. J. Q. B. 772.

(36) 10 H. L. C. 191; 33 L. J. Ch. 193; 11 W. R. 171.

—it binds the whole of the husband's property of every kind except business assets.

[VAUGHAN WILLIAMS, L.J., referred to *Campion v. Cotton* [1810] (37) and *Hardey v. Green* [1849] (38).]

In *Hardey v. Green* (38) there was no bill to rectify, and the Court had to take the settlement as it was. "Business assets" in the covenant must mean assets which, in the event of the business requiring them, would be used to pay the debts of the business.

Further, the deed of assignment of the furniture is void as against the trustee on the ground that it was not registered or attested as required by the Bills of Sale Act, 1878, ss. 8, 10. The assignment falls under the definition of "bill of sale" in section 4. At the date of the petition these articles were on the premises occupied by the debtor, and were used and enjoyed by him. The trustees of the settlement had nothing but the covenant, and they had done nothing to take possession of the property. No doubt, if the chattels are really *bonâ fide* the property of the trustees of the settlement, or of the wife, the fact that they were in the house of the matrimonial domicile would not be taken to show that they were in the order and disposition of the husband—*Ramsay v. Margrett* (11) and *In re Satterthwaite, Ex parte Trustee* [1895] (12)—but this case is not like those. These goods were in the possession of the bankrupt at the date of the petition in the sense that they were in the house where he generally lived. They were not in the possession of the wife.

Horridge, K.C., in reply:

We can obtain instructions to represent the wife here as well as the trustees of the settlement. As to the validity of the settlement, whether the case of *In re Clint, Ex parte Bolland* (4), was decided 18 Eliz. c. 5 or under section 91 of the Bankruptcy Act, 1869, it was overruled by *In re Bamford, Ex parte Games* [1879] (39). *Hardey v. Green* (38) is also directly in point, where the question was actually raised that the covenant on the face of it could not be *bonâ fide*. Moreover, in the present case "business assets" are

(37) 17 Ves. 263 *l.*

(38) 12 Beav. 182; 18 L. J. Ch. 480; 13 Jur. 777.

(39) 12 Ch. D. 314; 40 L. T. 789; 27 W. R. 744.

excepted, and this distinguishes the case from *In re Clint, Ex parte Bolland* (4).

[They also cited *In re Holland, Gregg v. Holland* [1902] (40).]

The trustee must put his case either on the statute of Elizabeth or on the ground of vagueness. The assignment was specific; but, assuming that it was not, it is not now open to objection on the ground of vagueness or wideness; and when once the subject-matter of it has been ascertained it can be specifically performed: *Tailby v. Official Receiver* (29), *In re Clarke, Coombe v. Carter* (32), *In re Turcan* [1888] (41). *Lewis v. Madocks* [1808-1810] (5), shows that the Court will give effect to the covenant. There is no ground for the suggestion that the covenant was released by the former bankruptcy so as to render the two deeds of 10 June mere voluntary assurances. There was no "liability" within section 31 of the Bankruptcy Act, 1869, which could be the subject of proof: *Collyer v. Isaacs* (6), per JESSEL, M.R.; *Hardy v. Fothergill* (7), per EARL SELBORNE, L.C.

[VAUGHAN WILLIAMS, L.J., referred to *In re Tonnies, Ex parte Bishop* [1873] (42).]

We rely also on *Robinson v. Ommanney* (28). The assignment of the furniture in pursuance of the covenant in the ante-nuptial settlement did not require registration as a bill of sale, being within the exception of a marriage settlement within section 4 of the Bills of Sale Act, 1878: *Wenman v. Lyon* [1891] (8), and *Courcier v. Bardili* [1882] (9).]

H. Reed, K.C., referred in addition to *Buckwell v. Norman* [1898] (43) and *Seaton v. Deerpur* (Lord) [1895] (44) as to debts provable in bankruptcy.

Cur. adv. vult.

(40) 9 *Manson*, 259; [1902] 2 Ch. 360; 71 L. J. Ch. 518; 86 L. T. 542; 50 W. R. 575.

(41) 40 Ch. D. 5; 58 L. J. Ch. 101; 59 L. T. 712; 37 W. R. 70.

(42) L. R. 8 Ch. 718; 42 L. J. Bk. 107; 28 L. T. 862; 21 W. R. 716.

(43) 5 *Manson*, 64; [1898] 1 Q. B. 622; 67 L. J. Q. B. 435; 78 L. T. 248; 46 W. R. 339.

(44) 2 *Manson*, 355; [1895] 1 Q. B. 853; 64 L. J. Q. B. 430; 72 L. T. 453; 43 W. R. 436.

May 17.

The judgments of the Court were delivered in the following order:

COZENS-HARDY, L.J.: This is an appeal from the order of Mr. Justice WRIGHT declaring certain deeds executed by the bankrupt in June, 1903, pursuant to a covenant contained in his marriage settlement of 1879, void under section 47, sub-section 2 of the Bankruptcy Act, 1883, as against the trustee, on the ground that he had "become bankrupt"—that is, had committed an act of bankruptcy—on 26 May. The act of bankruptcy relied on was that Reis on that day gave notice to his Stock Exchange creditors that he had suspended, or that he was about to suspend, payment of his debts—see section 4, sub-section 1 (*h*) of the Bankruptcy Act, 1883.

Now the meaning of that sub-section has been fully explained by Lord Justice VAUGHAN WILLIAMS in two cases—*In re Scott, Ex parte Scott* (2), and *Hill's Trustee v. Rowlands* (3). The result of the authorities is that a statement by a debtor that he is unable to pay his debts in full is not by itself an act of bankruptcy, although it may be such if it amounts to a statement that he intends to deal with his creditors in a body.

The transaction of 26 May does not in my opinion fall within this category. Reis and his solicitor gave each of his Stock Exchange creditors individually permission at once to close his account, which they could not have done without such permission. Each broker acted for himself; each brought an action for the balance due. I cannot regard this as falling within the sub-section. This was the only point on which Mr. Justice WRIGHT gave a decision, although various other points were argued before him upon which it was not necessary for him to express an opinion. But, as we are differing from the learned Judge, the respondents have relied before us upon other grounds.

It is urged that the covenant by the husband in the marriage settlement of 1879 was first void under the statute of Elizabeth against creditors—13 Eliz. c. 5; secondly, that it was so vague and general that the Court ought to decline to grant specific performance of it; and thirdly, that it was released by the bankruptcy of the husband in 1880, with the result that the deeds of 10 June, 1903,

were voluntary and therefore void under section 47, sub-section 1 of the Bankruptcy Act, 1888.

In order to succeed upon the first contention—that is, that the deeds were void under the 13 Eliz. c. 5 against creditors—it is necessary to show that the wife was party or privy to the fraud. Of this there is, and can be, no direct evidence. But it is urged that the deed itself to which she was a party is of such a nature that it cannot be deemed other than a fraudulent deed. The decision of Chief Judge BACON in *In re Clint, Ex parte Bolland* (4), undoubtedly supports this view. But in my opinion that decision is inconsistent with a line of authorities of which *Hardey v. Green* (38) need alone be referred to. The judgment of Lord LANGDALE in that case seems to me to establish that such a covenant is not on the face of it fraudulent. Then as to the next point, that the covenant is so vague and general that the Court ought to decline to grant specific performance of it, I think the husband's covenant is not too vague and general to be enforced. Lord ELDON, in *Lewis v. Madocks* (5), held that such a covenant on construction must attach to and affect capital only, and not income, unless “laid up as capital,” and that the Court ought to give effect to the covenant. *Hardey v. Green* (38) is to the same effect. As to the third point, that the covenant was released by the bankruptcy of the husband in 1880 with the result that the deeds of June, 1908, were voluntary, and therefore void under section 47, sub-section 1, I think this objection cannot prevail. When once it has been decided that the covenant is one of which specific performance can be obtained, it follows that the right to specific performance is not barred by the bankruptcy. The covenant is not ancillary to a debt which was released by the bankruptcy, and there is no evidence of any breach of the covenant before the bankruptcy was closed. There is nothing in *Hardy v. Fothergill* (7) which justifies the respondent's contention upon this point. Lastly, an objection was taken to the assignment of the furniture on the ground that the deed was not registered as a bill of sale, and that the furniture remained in the apparent ownership of the bankrupt. The only act of bankruptcy which can be relied on was on 29 June, and that is the date to which the title of the trustee relates. Now a marriage settlement is not a bill of sale within the definition of the Bills of

Sale Acts, and it is urged by counsel for the appellants that the furniture was bound in equity by the covenant in the marriage settlement of 1879, which did not require registration, and that the deed of 10 June was only for the purpose of completing the legal title by means of an actual transfer of the property. There has not been any transfer of the furniture by delivery to the trustees. They must rely upon the deed of 10 June, 1903, as transferring the property to them. The question arises whether that deed is a "marriage settlement" within the exception in section 4 of the Bills of Sale Act, 1878, or is an absolute assignment of personal chattels within the meaning of section 8 of that Act, which cannot be the foundation of a title as against the trustee in bankruptcy. Now the deed of 10 June may, I think, be fairly regarded as forming part of the marriage settlement. It was executed in pursuance of a covenant in the deed of 1879, and was in the nature of a further assurance. A post-nuptial settlement executed in pursuance of an ante-nuptial deed falls within the term "marriage settlement" in the Bills of Sale Act. This is the conclusion at which I should have arrived apart from authority, and it accords with the view taken by the Court of Appeal in the case of *Courcier v. Bardili* (9), a note of which is found in the Solicitors' Journal for 1883, but which is not fully reported anywhere else.

The result is that, in my opinion, the appellants succeed both as to the leasehold house and as to the chattels.

STIRLING, L.J.: The first question to be considered in this case is whether Reis committed an act of bankruptcy on 26 May, 1903. Mr. Justice WRIGHT finds that he did, the act being that he gave notice to his creditors, or some of them, that he was about to suspend payment of his debts, that being an act of bankruptcy under section 4, sub-section 1 (*h*) of the Bankruptcy Act, 1883. It is my misfortune to differ from the conclusion at which Mr. Justice WRIGHT arrived, and in that respect I only differ from him on the question of fact which he decided, and I do not quarrel with any of the law which he laid down in his judgment. In considering the meaning of the sub-section with which we have to deal particularly, it has to be borne in mind that by sub-section (*f*) it is an act of bankruptcy if there is filed in the Court a declaration of an inability

on the part of the debtor to pay his debts. These two sections were much considered in the House of Lords in the case of *Crook v. Morley* (1), where Lord SELBORNE, in advising the House, says, "It is undoubtedly possible, that there might be a document speaking of inability to pay a man's debts in such a context and in such a manner as not to imply 'that he had suspended, or that he was about to suspend payment of his debts.' But on the other hand there might be a document of which the language might amount to 'a declaration of his inability to pay his debts,' which, taking it with all its circumstances and in its context, would practically and according to the common sense of mankind, be a 'notice to his creditors that he had suspended, or was about to suspend payment of his debts.'" In the same case Lord WATSON says: "A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors, in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. But that such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full, and to place his assets at the disposal of his creditors, does not appear to me to be doubtful." The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts, that is to say, to abstain from paying his debts as they fall due at least for a time. Now in the present case, Reis was an outside broker who found himself in difficulties as to the settlement which was to take place on the Stock Exchange at the end of May, 1903. He consulted a solicitor, and that solicitor, by his instructions, saw two of the largest Stock Exchange creditors, Lumsden and Hart, on 26 May. This was the day on which at midday the amount which would have to be paid by Reis at the settlement would be ascertained. But that amount would not be actually payable till 29 May. The solicitor informed those two Stock Exchange creditors that Reis would have difficulty in paying them, they being large creditors, on 29 May. He informed them that he had Mr. Reis's authority to give power, if they saw fit, to close the accounts between them and Reis before 29 May, a step which might be for the benefit of the Stock Exchange creditors, and which

he was willing they should take if they saw fit so to do. They agreed to avail themselves of this permission, but one of them said to the solicitor that if there were any other Stock Exchange creditors they ought to have the same liberty. Thereupon the solicitor undertook to communicate a like liberty to the other creditors, who were not creditors to nearly the same extent as the two with whom he was dealing, and he did in point of fact communicate with them that they were at liberty to close their accounts in the same way as Lumsden and Hart. Besides those Stock Exchange creditors there were others—two at least, one of considerable importance—namely, Reis's bankers—and no reference was made as to any dealing with them whatever. In these circumstances I am unable to agree with Mr. Justice WRIGHT that the debtor did give notice to any of his creditors that he had suspended or was about to suspend payment of his debts. Certainly he did nothing which would indicate an intention on his part to place his assets entirely at the disposal of his creditors or to preclude himself from dealing as he might think fit with others, with whom no communication appears to have been made, nor, I think, with the Stock Exchange creditors, Lumsden and Hart. For these reasons I am unable to agree with the conclusion of fact at which Mr. Justice WRIGHT arrived.

The next point which I have to consider is this: whether Reis was released from the covenant in his marriage settlement by the previous bankruptcy. The marriage settlement was executed on 9 September, 1879. Reis became bankrupt in 1880, and he received his discharge in 1882. At that time, so far as appeared, Reis had not acquired any property within the covenant in the marriage settlement; there was no proof by the trustees of the settlement in the bankruptcy. But it is said that the liability of Reis under the covenant was provable in the bankruptcy, and consequently that the bankrupt was released from it by the order of discharge. At the time in question the Bankruptcy Act in force was that of 1869, the material sections of which are sections 12, 31, and 49. The material provisions of these sections were incorporated in the present Act of 1883. Now those sections were considered in two cases: namely, *Collyer v. Isaacs* (6) by the Court of Appeal, and the case of *Hardy v. Fothergill* (7) in the House of Lords. In *Collyer v. Isaacs* (6) the case to be considered was one in which

there was given as the security for the debt an assignment of future chattels. The debtor became bankrupt, and after the bankruptcy and the order of discharge he acquired chattels which answered the description in the security—but the creditor did not prove his debt in the bankruptcy—and it was held that the security so far as affected his future chattels was discharged by the bankruptcy. It is obvious that the case there was entirely different from the present case, in which we have to deal with a covenant in a marriage settlement for the settlement of after-acquired property. The MASTER OF THE ROLLS (Sir GEORGE JESSEL), in giving his judgment in that case, carefully guards himself against saying that what was decided in that case would apply to the case of a marriage settlement containing a covenant to settle after-acquired property, saying that when you have a debt and a covenant to secure that debt in a particular way it would be a strange result if it barred the debt and not the ancillary covenant. In the case of *Hardy v. Fothergill* (7) the question again was of an entirely different nature, the question relating to the liability of the assignee of a lease for a term of years who had covenanted to indemnify the lessees against damages for breach of their covenants. In that case it was held that the claim of the lessee was barred under section 49 of the Bankruptcy Act, 1869, the effect of section 31 being to make the assignee's future and contingent liability on his covenant to indemnify a debt provable in the bankruptcy unless an order of Court declared it to be a liability incapable of being fairly estimated. In advising the House of Lords, Lord SELBORNE says this: "There may be contracts, such, for example, as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, &c.; which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy." These observations of Sir G. JESSEL and of Lord SELBORNE of course do not amount to decisions, but I think they afford guidance in the decision of the present case. In my judgment, the covenant in the present

case is one in which specific performance is the appropriate remedy, and it ought not to be held barred by the order of discharge in the first bankruptcy.

The next point to be considered is whether the covenant is too vague or too wide to be capable of specific performance in a Court of equity. On this we have the guidance, as it appears to me, of clear authority. In the case of *Lewis v. Madocks* (5) there was a covenant in a marriage settlement on the part of a husband that he would "by deed or will convey, give, devise, and assure, all and singular his ready money, goods, chattels, personal estate and effects, to and for the use and behoof of him the said Richard Madocks, and Ann, his said intended wife, and the survivor of them for ever," upon certain trusts. Lord ELDON decreed specific performance of that contract after the death of the husband. The form of judgment is stated at the end of the report (p. 158), and it began with a declaration that the personal estate of which the husband was possessed during the coverture was liable under the contract. In a subsequent case, *Hardey v. Green* (39), Lord LANGDALE held that property coming to a husband after marriage was bound by a stipulation contained in articles executed previous to the marriage "by which the husband and wife agreed that all property, estate and effects, to which the husband or wife might thereafter become entitled, should be settled to such uses as the wife should appoint, and in default on trusts for the husband, wife and children." The decree gave specific performance of the stipulation in the articles. These cases have never been overruled, and they form strong authority in favour of the proposition that the language of the covenant with which we have to deal in the present case is not too vague to be binding. If anything more is required, I should desire to refer to the judgment of Lord Justice BOWEN in *In re Clarke, Coombe v. Carter* (32), and the observations of Lord MACNAGHTEN on that case in *Tailby v. Official Receiver* (29).

But a further objection was made that the covenant was so wide that it would be wrong of the Court to enforce it, on the ground that if fully carried into effect it would prevent the husband from paying his debts and deprive him of the means of subsistence. In that the observations of Lord Justice COTTON, in the case of *In re Clarke, Coombe v. Carter* (32), and *In re Turcan* (41), were referred

to. Now to this objection there appear to me two answers—first, from the covenant in the marriage settlement in the present case the business assets of the husband are expressly excepted, and that appears to me to constitute a substantial exception. Secondly, if there were no such exception, it would still seem to me that the same case of *Lewis v. Madocks* (5), at a subsequent stage, is an authority for holding that a covenant is not to be construed so as to prevent the husband from paying his debts and maintaining his family. *Lewis v. Madocks* (5) came on for further consideration, and in the course of the argument Lord ELDON said “he could not adopt the construction, that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of this bond, except only to the extent in which the husband himself might think proper to lay up that produce as capital: otherwise they would not be at liberty to spend a shilling: but in providing for their maintenance and comfort they could not go beyond income.” For these reasons I think that effect ought not to be given to this objection.

Next it was urged that the covenant was void under the statute of Elizabeth. As a general rule a marriage settlement cannot be set aside as a fraud on creditors of the husband unless evidence is given that the wife was party to the fraud: see *Kevan v. Crawford* [1877] (45). No such evidence was adduced in the present case. It was said, however, that the wife must be taken to have known the terms of the settlement, and those terms were on the face of them, in the language of the Lord Justice in *In re MacBurnie, Ex parte MacBurnie's Trustees* [1852] (46), grossly out of proportion to the station and circumstances of the husband, or so extravagant as that they ought to awaken inquiry. I am unable to come to that conclusion. On this point of the case *Hardey v. Green* (39), already referred to, is a direct authority. The case of *In re Clint, Ex parte Bolland* (4), which was much relied upon on behalf of the creditors, if rightly decided, is distinguishable, for there the covenant extended to all after-acquired property—property of the husband; while here, as I have already pointed out, the business assets constitute an exception.

(45) 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 26 W. R. 49.

(46) 1 De G. M. & G. 441; 21 L. J. Bk. 15; 16 Jur. 807.

Last of all, it was urged that there had been no actual transfer pursuant to the contract before the commencement of the bankruptcy under section 47, sub-section 2 of the Bankruptcy Act, 1883. In the present case the bankrupt, in pursuance of the written notice served on him on 23 May, 1903, by the trustees of the settlement, executed on 10 June, 1903, before the commencement of the bankruptcy, two deeds, by one of which the house was conveyed to the trustees, and by the other of which the furniture in that house was assigned to them—in both cases upon the trusts of the settlement. No question was raised as to the conveyance of the house being an actual transfer sufficient to prevent the operation of section 47, sub-section 2 of the Act of 1883. But it is contended that the assignment of the furniture is a bill of sale within the meaning of the Bills of Sale Act, 1878, and is void against the trustee in bankruptcy under section 8 by reason of its not having been registered in accordance with section 10 of the Act of 1878. To this it is answered that by section 4 of the Act of 1878 marriage settlements are excepted from the operation of the Bills of Sale Act, and that the assignment of 10 June, 1903, is a marriage settlement within the meaning of the exception. I think that this is a valid answer to the objection. Unquestionably a wide meaning has been given to the expression “marriage settlement” in these Acts. Thus it was held in *Wenman v. Lyon* (8) by the Divisional Court and by the Court of Appeal that an agreement for a marriage settlement which provided for the execution by a subsequent assignment to trustees of certain property of the intended husband was such a marriage settlement, and was effectual to protect the property against the trustee in the husband’s bankruptcy, although the agreement was not registered and no assignment to the trustees was ever executed. In *Courcier v. Bardili* (9), which appears to be only reported in the Solicitors’ Journal, it was also held by the Divisional Court and by the Court of Appeal that a post-nuptial settlement in pursuance of an ante-nuptial settlement was within the exception of the enactment of 1878, and did not require registration. In my opinion the principle of these decisions applies. The assignment of 10 June, 1903, was a marriage settlement within the exception in the Bills of Sale Act, 1878, and did not require registration, and the objection founded upon the point of registration

appears to me to fail. I think, therefore, the appeal ought to be allowed.

VAUGHAN WILLIAMS, L.J.: I have had the advantage not only of reading the judgment of Lord Justice COZENS-HARDY, but of having communicated to me the views of Lord Justice STIRLING in this case; and that being so, I did not consider that I should be doing any good service to the law in merely multiplying judgments which were intended to say the same thing as other judgments had already said. I feel that the judgments of Lord Justice COZENS-HARDY and Lord Justice STIRLING have covered the whole ground, and I therefore propose to say very little. First, I propose to say out of respect for Mr. Justice WRIGHT, that I entirely agree in the view of Lord Justice STIRLING that there is nothing in our judgment to-day which interferes with any proposition of law which was laid down by Mr. Justice WRIGHT. All that we are doing to-day in differing from Mr. Justice WRIGHT, is as to a conclusion in fact. Mr. Justice WRIGHT came to the conclusion that the solicitor who was acting on behalf of the bankrupt, Reis, was making a communication which was intended as a communication having reference to all his creditors—a communication that he intended to suspend payment—a communication of such a character that if he had made that statement the bankrupt would have been guilty of a breach of faith, if he had, after making that statement, made any arrangement with any particular creditor for the discharge of his debt. I have come to a different conclusion in fact. I have come to the conclusion that all that the solicitor was doing on behalf of the bankrupt when he made the communication to Messrs. Lumsden and Hart was to negotiate with particular creditors as regards their particular debts. He agreed that they should be entitled to do that which they could not have done without his consent—that is, to close the accounts. Upon that point I have no more to say.

I do propose to say a few words as to two of the many points which were raised in this case; but before I do so I should like to say at once a word in respect of the case of *In re Clint, Ex parte Bolland* (4). I do not know really that I have anything to add to what Lord Justice STIRLING has said about it. This case of *In re*

Clint, Ex parte Bolland (4), I can say of my own personal knowledge and experience as a bankruptcy Judge, is a case which has been frequently dealt with. I think that hereafter that case of *In re Clint, Ex parte Bolland* (4), ought not to be treated as a standing authority. I am quite well aware that there is a distinction in the fact that the property covered was much wider in the case of *In re Clint, Ex parte Bolland* (4), than it is in the present case, and that one might decide the present case without impugning at all the authority of that case on the ground of these differences that have been referred to. But, speaking for myself, I prefer to say that I do not think that *In re Clint, Ex parte Bolland* (4), ought any longer to be regarded as a standing authority.

Having said that, there are two points upon which I mean to say a few words. First, the point as to the effect upon the marriage settlement of the prior bankruptcy; and, secondly, the point of the necessity of registration of the formal instrument of assignment which followed the original marriage settlement. Now with regard to the first of these points, the facts are simply these—that Reis made a marriage settlement in 1879—a marriage settlement as to which I may mention in passing that to my mind it is impossible with regard to that marriage settlement to suggest that the execution of it involved any participation by Mrs. Reis to defeat and delay creditors so as to bring the case within the operation of the statute of Elizabeth. That marriage settlement contained a covenant very wide in its terms with regard to the future property of the bankrupt, not comprising the whole of his future property but future property, to put it shortly, to the exclusion of his business assets. Subsequently to 1879 Reis became bankrupt. The suggestion made is that the effect of that first bankruptcy was to relieve Reis, the bankrupt, for ever from the obligations in that marriage settlement under that covenant. Of course, if that were so, the result would be that there would be no instrument in the field of operation under which it could be said that, as the husband from time to time acquired property other than his business assets, such property would in equity pass to the trustees of this marriage settlement. I really should not have mentioned this point at all, seeing that I entirely agree with the observations that have been made by my brethren about it, if it were not for the fact

that this is a new point as to which there is no positive authority whatsoever. There is the passage in the judgment of Sir G. JESSEL in *Collyer v. Isaacs* (6), to which Lord Justice STIRLING referred, and there is also the passage in the judgment of Lord SELBORNE in *Hardy v. Fothergill* (7). I do not propose to go into those two passages in detail—they have been read; it is sufficient to say of those passages that they certainly show that neither of those learned Judges was then prepared to affirm the proposition that the bankruptcy and discharge of the husband after a marriage settlement like this would discharge him from all obligations under a marriage settlement. But I propose to read two or three words from the same passage to which Lord Justice STIRLING referred in the advice given by Lord SELBORNE to the House of Lords. After quoting the words of section 31 of the Bankruptcy Act, 1869, Lord SELBORNE proceeds: [His Lordship here read the passage already referred to by Lord Justice STIRLING, and continued:] It will be observed that amongst these contracts which Lord SELBORNE suggests might, upon a fair reading of the construction of the definition which I have read from the Act of Parliament, be excluded from it, there are not only negative covenants, but there is in one example certainly a positive covenant, as a promise to marry, not broken. In concurring as I do entirely with the judgments of my brethren on this point, I wish to say shortly that the ground upon which I concur is that in my judgment the marriage settlement does not fall within this definition of liability. It is a contract which has been made with a different object from that of the payment of money in any contingency. I wish to add by way of caution that no amount of difficulty in the estimate of the value would justify the exclusion in this Court of a proof of debt, because in my judgment the plain words of the statute show that if once the debt or liability, as the case may be, is shown to come within the definition, the only Court which can exclude that debt from the operation of bankruptcy and its consequent discharge in freeing the debtor is the Court of Bankruptcy, and the Court of Bankruptcy dealing with the particular bankruptcy which has occurred. Therefore, in this case, it would not make the very slightest difference that the debtor, Reis, was the same in the 1881 bankruptcy as he is in the later bankruptcy. This Court would not have jurisdiction

now to declare the value of the debt or liability incapable of estimate. The ground upon which I have come to the conclusion that this liability of the bankrupt under this marriage settlement is not discharged by the earlier bankruptcy is because in my judgment it does not fall within the definition of "liability" which I have read. As to this point I may say, in passing, that Mr. Justice WRIGHT did not have to deal with any of these matters because, having arrived at the conclusion there was a prior act of bankruptcy, it was sufficient for the point he had to decide.

The only other matter to which I propose to refer at all is the necessity for the registration of the instrument which was executed in pursuance of the marriage settlement of 1879. The marriage settlement of 1879 contemplates that there may be executed from time to time by the husband a formal instrument assigning to the trustees of the marriage settlement the property in the goods—the subject-matter of it—as they came into existence. That being so in 1903, the year of his last bankruptcy, the trustees of the marriage settlement apparently became anxious in the matter, and they thought it desirable to get the debtor to execute certain instruments in the nature of assignments—which he did, and the date of those instruments is 10 June, 1903. The petition itself was based on a subsequent act of bankruptcy at the end of the same month. We have negatived the act of bankruptcy by the notice of intention to suspend which was the key of the decision of Mr. Justice WRIGHT. It has been said that the rights of the trustees under this marriage settlement had been avoided, because the second of these two documents had not been registered, as it ought to have been under the Bills of Sale Act. I think that there is sufficient authority already for the proposition that such a document does not require registration. But as the point has not been raised in very clear form, I thought it better to write a word or two upon that, which I will read.

The last point made on behalf of the respondent was that the goods and chattels, the subject of the settlement of 1879, were not the property of the trustees of the marriage settlement as against the trustee in bankruptcy, because the title of the trustees of the settlement depends upon the deed of transfer of 10 June, 1903, and that that deed is void as a bill of sale for want of registration, or is void as falling within the operation of sub-section 2 of section 47 of

the Bankruptcy Act of 1883. I say at once, in passing, so as not to have to mention it again, no point really arises under sub-section 2 of section 47, because, inasmuch as under our decision the commencement of the bankruptcy is not until the end of the month of June, the terms of the section, however strictly construed, are fully complied with by the execution of the instruments of 10 June. I think that this point under the Bills of Sale Act fails. The question of the necessity for registration depends upon section 4 of the Bills of Sale Act, 1878, which excepts a marriage settlement from the definition of bills of sale. By the very terms of that section the expression "bill of sale" includes not only assignments, but "also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." It is plain, therefore, that the ante-ruptial document would have required registration but for the exception, and that notwithstanding that the document was intended to be followed by the execution of another instrument; but the exception exempts this document as being a marriage settlement from the necessity to register; and I think there is nothing in the Bills of Sale Act, 1878, which takes away the equitable rights conferred by such a marriage agreement if in fact it is followed in pursuance of its terms by an assurance or transfer which is not registered.

The case of *Wenman v. Lyon* (8), decided by Baron POLLOCK and Mr. Justice CHARLES, which was affirmed on appeal, makes it clear that the words "marriage settlements" include a memorandum of a marriage settlement which conveys equitable rights only, and would include marriage articles intended to be followed by a formal marriage settlement. It seems to me impossible that the non-registration of an instrument intended to give legal effect to a prior instrument, which had by virtue of the exception in favour of marriage settlements already created valid equitable rights, could avoid or extinguish those rights. A marriage contract might be so drawn that it would manifest an intention that no property should pass unless and until a further instrument of transfer was executed. Such a contract would create a power to seize something in the nature of a floating security, and would, I think, undoubtedly be a bill of sale, and I am inclined to think a marriage settlement, but I

do not think that the present marriage contract is such an instrument. [His Lordship read the words, and continued :] I do not think that, according to these words, the execution of a transfer or the taking possession by the trustees is a condition precedent to the passing of the property. This being so, it follows, in my judgment, that the bill of sale point fails. The settlement of 1879 did not require registration, and the equitable rights arising under that settlement, as the subject-matter of it from time to time has come into existence, are not avoided by the non-registration of the instruments of transfer of June, 1903.

The result of all this is that the appeal is allowed, with costs.

Appeal allowed.

Solicitors : *Norden, De Freece & Co.*, for the Appellants.

Martin & Co., for the Respondent.

IN RE WILLIAM WATSON & CO., EX PARTE
ATKIN BROTHERS.

1904, July 22, 29. C. A. VAUGHAN WILLIAMS, ROMER, AND COZENS-
HARDY, L.JJ.

Bankruptcy—Order and Disposition—Reputed Ownership—Articles Displayed by Bankrupts in Show-cases with Consent of True Owners—Principal and Agent—Bankruptcy Act, 1883, s. 44, sub-s. 2 (iii.).

Before goods of another person can be taken to pay the debts of a bankrupt, by reason of the reputed ownership of the bankrupt, it is essential that the true owner of the goods should have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must arise.

W. & Co., who had carried on business as bankers and agents, had been in the habit of introducing their customers to wholesale firms for the purchase of various articles, and amongst them to A. & Co. W. & Co. received from A. & Co. certain silver and electro-plated articles as samples, with a consignment note giving particulars of the articles and their prices, and the correspondence between the parties showed that they were only received by W. & Co. as samples, and were to be put into their show-cases as such, and were to remain at the risk of A. & Co., and there was nothing to authorise W. & Co. to take upon themselves the order and disposition of the goods. W. & Co. also dealt in goods of the same kind on their own account, but the samples of A. & Co. were generally dealt with by them in a different way from the way in which they dealt with their own goods. The samples of A. & Co. were in the possession of W. & Co. at the date of their bankruptcy:—

Held, that A. & Co. had not acquiesced in the bankrupts so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or to induce customers to presume such ownership; and the articles were not in the order and disposition of the bankrupts under such circumstances that they were the reputed owners thereof within the meaning of sub-section 2 (iii.) of section 44 of the Bankruptcy Act, 1883.

Sharman v. Mason (1) explained.

THIS was an appeal from a decision of WRIGHT, J.

The question was whether certain goods claimed by Messrs. Atkin Brothers as belonging to them were at the commencement of the bankruptcy of Messrs. William Watson & Co. in the possession, order, or disposition of the bankrupts, in their trade or business, by the consent and permission of the true owners, under such circumstances that the bankrupts were the reputed owners thereof, and the goods were consequently property divisible among the creditors

(1) 7 Manson, 19; [1899] 2 Q. B. 679; 69 L. J. Q. B. 3; 81 L. T. 485; 48 W. R. 142.

of the bankrupts under section 44, sub-section 2 (iii.) of the Bankruptcy Act, 1883.

The bankrupts, William Watson and Paul Pfeiderer, formerly carried on business as bankers, agents, and merchants, under the firm name of William Watson & Co., with an office in London, and branches in various places in England and abroad. A receiving order was made against them on their own petition on 30 January, 1904. They were adjudged bankrupts on 1 February, 1904, and a trustee was appointed on 18 February.

Messrs. Atkin Brothers were silversmiths and electro-platers, carrying on business in London.

In the course of their business the bankrupts used to introduce customers of theirs to various wholesale firms for the purchase of various goods, stating in the written introduction that if a sale was effected it was to be "on our account." The form of order for the goods, which was in their name, stated that it was to be charged "to our account," and there was attached to that form a form signed by their client authorising them to pay for the goods and debit him. In these forms the bankrupts were described as "East India and general agents."

Messrs. Atkin had from time to time transacted business with the bankrupts in this way.

On 2 June, 1903, the bankrupts wrote to Messrs. Atkin as follows: "We are now in our new offices in the same building, and have various show-cases to furnish. It has occurred to us that you might care to place a few samples with us, which would doubtless have the effect of materially increasing our account with you. If at any time you are this way and would call and see us, we should be glad to arrange a position for your goods."

On 10 July, 1903, Messrs. Atkin, in answer to this suggestion, sent certain silver and plated articles, the value of which was put at 23*l.* 4*s.* 8*d.*, to the bankrupts, sending with them a consignment note giving particulars of the articles and their prices, on which were the words "For your cases."

On 11 July, 1903, the bankrupts wrote to Messrs. Atkin as follows: "We duly received the plated goods as invoiced for our cases for which we are very much obliged. They look very well indeed, and we will carefully watch them for the first sign of

discoloration when we will pack them again and only open to inquirers."

Messrs. Atkin subsequently from time to time received orders from the bankrupts asking them to supply goods corresponding with their samples.

On 7 August, 1903, the bankrupts wrote to Messrs. Atkin as follows: "We notice a very slight discoloration on the plate we have in our case, and we shall be glad if any time you are passing you would see and advise us if we can by any means keep the same in proper condition or whether it is unwise to retain it any longer."

The bankrupts themselves sold electro-plated articles, amongst other things, which they also exhibited in their cases.

On hearing of the failure of the bankrupts Messrs. Atkin wrote to the trustee in bankruptcy demanding the return of their goods. The trustee refused to return them on the ground that they were in the order and disposition of the bankrupts. Messrs. Atkin replied that the goods were never invoiced to the bankrupts, but were simply lent to them as samples of the kind of goods that Messrs. Atkin manufactured, and they had never ceased to be their property; and, the trustee still refusing to accede to their request, they on 29 March, 1904, gave notice of motion for a declaration that the goods in question were their property, and that the trustee had no right or title to any of them, and an order that the trustee should deliver the articles to them, or pay to them the value thereof.

They alleged that the bankrupts knew that the goods were their property, and that it was no part of the business of the bankrupts to sell goods of that class except as commission agents.

WRIGHT, J., on 25 April, 1904, dismissed the motion, being of opinion that the goods were in the order and disposition of the bankrupts under such circumstances as to make them the property of the trustee; but he gave the applicants leave to appeal. Messrs. Atkins Brothers appealed.

Rawlinson, K.C., and Muir Mackenzie, for the appellants:

The learned Judge thought himself bound by *Sharman v. Mason* [1899] (1), but that case was, it is submitted, wrongly decided. The bankrupts were always described as bankers and agents, and

their creditors had notice of the agency sufficient to exclude the operation of the reputed ownership clause in the Bankruptcy Act as regards these goods: *In re Smith, Ex parte Bright* [1879] (2). To bring goods within that clause they must be in the possession of the bankrupt by the consent of the true owner under such circumstances that he is the reputed owner thereof. The question, therefore, is not what the bankrupt intended, but what the true owner consented to: *Colonial Bank v. Whinney* [1886] (3) and *Load v. Green* [1846] (4).

The consent must be proved to be a consent to such ownership as would be necessarily connected with ownership. If it might only be connected with agency, that is not sufficient: *Belcher v. Bellamy* [1848] (5).

[VAUGHAN WILLIAMS, L.J., referred to *In re Florence, Ex parte Wingfield* [1879] (6).]

All that the appellants consented to was that the goods should be put as their goods into the show-cases, and the bankrupts were merely custodians of them. The appellants never consented to anything which could amount to reputed ownership. In the correspondence the articles are referred to as their goods.

H. Reed, K.C., and *E. Clayton*, for the trustee in bankruptcy:

It is not necessary, for goods to come within the reputed-ownership clause, that they should be in the ownership of the bankrupt as part of his stock-in-trade. It is sufficient if they are in his possession for purposes connected with his trade: *Colonial Bank v. Whinney* [1885] (7). In this sense these articles were in the reputed ownership of the bankrupts. It is a question of inference from the facts in each case. The bankrupts themselves sold various articles, including, as their invoices show, electro-plated ware. Many of the

(2) 10 Ch. D. 566; 48 L. J. Bk. 81; 39 L. T. 649; 27 W. R. 385.

(3) 3 Morr. 207; 11 App. Cas. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705.

(4) 15 M. & W. 216, 223; 15 L. J. Ex. 113, 115.

(5) 2 Ex. 303, 311; 17 L. J. Ex. 219, 223.

(6) 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346.

(7) 30 Ch. D. 261, 274; 55 L. J. Ch. 585, 587; 53 L. T. 272; 33 W. R. 852.

things exhibited in their show-cases were their own property. There were no names on the cases. The goods were in cases just like the other cases in which the bankrupts' own things were, and there was nothing to show that the goods did not belong to them. If it were necessary to find the consent of the real owner to the reputed ownership no case could ever be brought within the reputed-ownership clause. All that is necessary is to find consent to the circumstances from which the ownership may be inferred. Lord SELBORNE summarises the result of the authorities in his judgment in *In re Couston, Ex parte Watkins* [1873] (8).

Muir Mackenzie replied.

[VAUGHAN WILLIAMS, L.J., referred to *In re Horn, Ex parte Nassan* [1886] (9).]

Cur. adv. vult.

July 22.

VAUGHAN WILLIAMS, L.J., read the following judgment of the COURT: The question in this case is whether certain goods at the commencement of the bankruptcy were in the possession, order, or disposition of the bankrupts in their trade or business, by the consent and permission of the true owners, under such circumstances that they were reputed owners thereof. In our opinion, it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise. We think that the cases of *Load v. Green* (4) and *Smith v. Hudson* [1865] (10) fully establish this proposition. Mr. Justice BLACKBURN, in his judgment in *Smith v. Hudson* (10), said: "The true owner as such must consent that the other side should be reputed owner, not being true owner." The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 James 1. It has been couched in various words in the successive bankruptcy statutes, but this principle has run

(8) L. R. 8 Ch. 520, 528; 42 L. J. Bk. 50, 51; 28 L. T. 793; 21 W. R. 530.

(9) 3 Morr. 51.

(10) 34 L. J. Q. B. 145, 151; 13 W. R. 683.

through them all, and the statement of Lord REDESDALE in *Joy v. Campbell* [1804] (11) (a case which has been approved and acted on again and again—see *Belcher v. Bellamy* (5), *Hamilton v. Bell* [1845] (12), and many other cases), that the true owner must have unconsciously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe not might, or might not) arise—see *Hamilton v. Bell* (12), *Gibson v. Bray* [1817] (13), and *Ex parte Bright* (2).

The question for us then is, Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business? Now it is obvious that, in deciding this question as to the consent of the true owner, one cannot leave out of consideration the true relation of the parties. The parties were not in fact vendors and purchasers, they were in fact principals and agents. There is, as Sir GEORGE JESSEL pointed out in *Ex parte Bright* (2), nothing to prevent a principal remunerating his agent by paying a commission depending upon the surplus which the agent can obtain over and above the price which will satisfy the principal, but of course the sale must not, with the consent of the true owner, take place under circumstances from which customers generally will be entitled to presume that the goods must be, not may or may not be, the property of the bankrupt. Now what are the circumstances of this case? The correspondence makes it clear that Messrs. Watson received the goods as samples or patterns, and that they were not stocking the goods as their own. The goods obviously were to remain at the risk of Messrs. Atkin, and Messrs. Watson undertook to return them if they became tarnished. There is nothing in the written arrangement to authorise Messrs. Watson to take upon

(11) 1 Sch. & Lef. 328, 336.

(12) 10 Ex. 545; 3 C. L. R. 308; 24 L. J. Ex. 45; 3 W. R. 62; 18 Jur. 1109.

(13) 8 Taunt. 76.

themselves the order and disposition of the goods. They could not sell them below the price fixed by Messrs. Atkin, at a price which would suffice them. But then it is said that in fact Messrs. Watson dealt with them in their trade or business in such a fashion that customers could not but presume that the goods were dealt with by Messrs. Watson at their unfettered order and disposition. Now this will not affect Messrs. Atkin unless they consented to the goods being so dealt with by Messrs. Watson. Now did they do so? In the first place, Messrs. Watson were in fact described in their business as "bankers and agents." The letters in which Messrs. Watson invited Messrs. Atkin to place samples with them are so headed, and we do not think that the fact that the bankrupts also dealt in goods which they stocked, and used suitable invoices for that part of their business, would entitle customers to presume that no part of the business of Messrs. Watson was done by them as agents. The fact that they are so described as agents is not, however, conclusive, because the evidence may show that in truth and fact they were dealing with these goods as though they were owners dealing with the goods as owners in their own business with the consent of Messrs. Atkin—see *In re Nevill, Ex parte White* [1871] (14)—but it is an element which cannot be left out of consideration in dealing with the question of what were the circumstances under which Messrs. Atkin consented that the bankrupts should have possession of these goods.

In the next place, it seems to us that, notwithstanding the fact that Messrs. Watson occasionally sold the samples and Messrs. Atkin did not object, yet the samples were generally so dealt with by Messrs. Watson that it must have occurred to the mind of the customers that these goods were not being dealt with by Messrs. Watson in the way in which they dealt with their own goods stocked by them. Their practice in sending the customers an introduction to Messrs. Atkin was also strongly suggestive of agency. We do not think that this is a case in which the true owners of the goods, by their unconscientious conduct or *laches*, had acquiesced in the bankrupts so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or induce customers to presume such ownership.

With regard to the judgment of Mr. Justice WRIGHT, although he said that, apart from the case of *Sharman v. Mason* (1), he held that these goods were in the reputed ownership of Messrs. Watson, yet the principal ground of his judgment is the decision in *Sharman v. Mason* (1), and he gave leave to appeal because he said that *Sharman v. Mason* (1) might require reconsideration. We do not think that Mr. Justice WRIGHT rightly understood the decision in *Sharman v. Mason* (1). He said that *Sharman v. Mason* (1) laid down that wherever goods are in possession of a bankrupt for the purpose of trade or business they are in the reputed ownership of the bankrupt, irrespective of whether there is or is not a power of sale. But we do not think that the decision means that. Certainly under the old law the question of reputed ownership was a question of fact in each case, and we do not think that the alteration of the words in the Act of 1869, "being a trader," into the words as they appear in the Act of 1883, "in his trade or business," has made any difference in this respect.

We think that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *E. J. de Buriatte*, for the Appellants;
Rising & Ravenscroft, for the Trustee.

IN RE MACOUN.

1904, July 22. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

*Bankruptcy — Petitioning Creditor—Receiver in Action in Chancery Division—
Independent Cause of Action—Judgment Debt Assigned to Receiver—Bank-
ruptcy Act, 1883, s. 6.*

A receiver in an action in the Chancery Division is entitled to present a bankruptcy petition against a debtor to his estate, if the state of things is such that he has an independent cause of action against the debtor. Consequently, a receiver in a partnership action to whom a judgment debt due to the partnership has been assigned is a good petitioning creditor against the judgment debtor, although the money when recovered is recovered for the purpose of being dealt with in the action.

In re Sacker (1) explained and distinguished.

THIS was an appeal against a receiving order made by Mr. Registrar Brougham.

The order, which was made on the petition of W. B. Peat, St. John Montagu Young, W. A. Nolckmann, and A. W. Pearce, stated that the debtor was justly and truly indebted to W. B. Peat in the sum of 695*l.* 9*s.* 5*d.*, being the amount of a judgment debt and interest and costs due on a final judgment obtained by Victor Levett against the debtor in the King's Bench Division on 17 November, 1902, which judgment debt had been assigned by Levett to Peat.

Peat was the receiver appointed in an action in the Chancery Division for the winding up of a firm of Montagu Young & Co., with which firm the debtor had had business transactions.

The other three petitioners were the surviving partners and the representative of a deceased partner in that firm.

The surviving partners had, in July, 1902, assigned to Levett all the partnership assets for the purpose of getting in the same and winding up the partnership.

Levett, in pursuance of that, brought his action against the debtor and recovered judgment.

The partnership action was commenced in June, 1903. Peat was appointed receiver on 12 August, 1903, and the judgment debt was assigned to him on 31 October, 1903.

(1) 22 Q. B. D. 179, 183, 184; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204.

Leave to issue execution on the judgment had been granted to Peat by an order in the action of 18 November, 1903. On 11 January, 1904, the debtor was duly served with a bankruptcy notice, and on non-compliance by him therewith the petition was presented on 9 March, 1904.

Young, Nolckmann, and Pearce alleged in the petition that they together represented all the partners in the firm of Montagu Young & Co., and were the persons who had the sole and entire beneficial interest in the judgment debt, and that the consideration for the debt was money lent and interest.

The debtor opposed the making of the receiving order on the ground that there was no good petitioning creditor's debt.

The receiving order was made on 20 May, 1904.

The debtor appealed.

E. W. Hansell, for the appellant :

This debt may be a good debt in the bankruptcy, but it is not a good petitioning creditor's debt. Under section 6 of the Bankruptcy Act, 1883, the debt must be owing to the petitioning creditor, and it cannot be owing to him unless he has some beneficial interest in it. Peat is a mere conduit-pipe—a person to get in money, which, when got in, will belong to the Court. It will not belong to any of the petitioners. The partners have elected to put their affairs into the hands of the Court. To constitute a good petitioning creditor's debt there must be something which can be the immediate subject of an action at law or suit in equity: *In re Muirhead, Ex parte Muirhead* [1876] (2); and it must be something for which the creditor could sue personally, not merely as officer of the Court: *In re Sacker* [1888] (1), *per* Lord Esher, M.R. *In re Lewis, Ex parte Harris* [1876] (3), at first sight seems contrary to that; but it was explained and distinguished in *In re Sacker* (1), and the creditor there had some beneficial interest in the debt. He was an auctioneer, and he had sold goods to the debtor, and he held a bill of exchange for the balance, for which he had to account to his principals.

The addition of the persons interested does not make the position any better, as Peat is not a trustee for the parties—he is an officer

(2) 2 Ch. D. 22; 45 L. J. Bk. 65; 34 L. T. 303; 24 W. R. 351.

(3) 2 Ch. D. 423; 45 L. J. Bk. 71; 34 L. T. 261; 24 W. R. 851.

of the Court. The persons beneficially interested are joined as parties where the trustee is a bare trustee—*In re Hastings, Ex parte Dearle* [1884] (4)—but that does not apply here. A man is not a bare trustee if he has duties to perform with regard to the money when he has recovered it.

[VAUGHAN WILLIAMS, L.J., referred to *In re Adams, Ex parte Culley* [1878] (5).]

Muir Mackenzie, for the petitioning creditors, was not called upon.

VAUGHAN WILLIAMS, L.J. : I think this appeal fails. There is undoubtedly a good deal in Lord Esher's judgment in *In re Sacker* (1) which does suggest—I think I may go further and say, which does positively assert—that in the hypothetical case which he puts there of a receiver being able to bring an action at law in his own name he would not be entitled to become a petitioning creditor because he does not come within the description of a petitioning creditor under the words of section 6 of the Bankruptcy Act, 1883. His Lordship there said : “ Even if he could by the authority of the Court sue for it in his own name, is the money due to him personally either at law or in equity ? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity ? I apprehend that he would hold it subject to the authority of the Court, who would deal with it according to the circumstances of the case, but certainly not for his benefit.” And further on he said : “ A ‘ creditor ’ in that section does not mean a person who, even if he can recover a sum of money in his own name, is only to recover it as an officer of the Court, for the purpose of enabling the Court to deal with it. Section 6 means a ‘ creditor ’ of a ‘ debtor ’ in the ordinary sense of the words.”

I think that those words go very far to cover the proposition for which counsel for the debtor contended, but it was not really necessary for the determination of the case which was then before

(4) 1 Morr. 281 ; 14 Q. B. D. 184 ; 54 L. J. Q. B. 74 ; 34 W. R. 440.

(5) 9 Ch. D. 307 ; 47 L. J. Bk. 97 ; 38 L. T. 858 ; 27 W. R. 28.

the Court of Appeal that this question should have been decided—that is, the question whether a receiver having a title to sue at law could be a good petitioning creditor. In the case of *In re Sacker* (1), it is plain, I think, from the judgments of each of the Lords Justices that the position of things was such that it was perfectly impossible for the receiver to bring an action to recover the debt either at law or in equity, and therefore I think we must treat these observations of Lord Esher as *obiter dicta*, and only look at the case as having decided that a receiver who could not sue could not be a good petitioning creditor by himself. Lord Justice FRY, in his judgment in that case, says that there the receiver could not have maintained an action against the debtor either at law or in equity; and later on he dealt with exceptional cases in which a receiver could maintain such an action in his own name, and one of the cases he gave was, if the receiver is the holder of a bill of exchange, and another was, if he is in possession of chattels, and the chattels are unlawfully detained from him.

In these circumstances, it seems to me that we ought not to hold the case *In re Sacker* (1) to be an authority for the proposition that a receiver cannot be a good petitioning creditor, even though the state of things is such that he could maintain an action at law against the debtor. It is plain that Lord Justice FRY thought that he could, and Lord Justices LOPES seems to have taken the same view—that is, the view that if the receiver were the holder of a bill of exchange he could be a good petitioning creditor. In the present case the receiver happens to be the assignee of a judgment; and I think that, being the assignee of a judgment, he could be a good petitioning creditor, even though when the money is recovered it is recovered for the purpose of enabling the Court of Chancery to deal with it. For these reasons I think that the appeal must be dismissed.

ROMER, L.J.: I agree.

COZENS-HARDY, L.J.: I agree.

Appeal dismissed.

Solicitors: *John K. Torkington*, for the Appellant;
Willis & Willis, for the Respondents.

IN RE SOLOMONS, EX PARTE SOLOMONS.

1904, August 2. BIGHAM, J.

Bankruptcy—Practice—Record Book kept by Trustee—Minutes of Meetings of Committee of Inspection—Right of Debtor to Inspect—Bankruptcy Act, 1883, s. 80—Bankruptcy Rules, 1886, rr. 285 and 292.

It is contrary to the usual practice of the Court in the absence of special circumstances to permit a debtor to inspect the record book kept by the trustee in bankruptcy, in which are entered the minutes of the meetings of the committee of inspection and other matters, as required by section 80 of the Bankruptcy Act, 1883, and rule 285 of the Bankruptcy Rules, 1886.

THIS was an application by the debtor for liberty to inspect the "record book" of his trustee in bankruptcy.

On 15 December, 1898, the debtor was adjudicated a bankrupt, and a trustee was appointed, with a committee of inspection.

In March, 1899, he applied for his discharge, which was refused. In April, 1899, he was prosecuted for an offence under the Debtors Act, 1869, and was convicted, but in the circumstances was only ordered to come up for judgment if called upon.

In April, 1900, the debtor renewed his application for his discharge, which was again refused. In the meantime a first and final dividend of 5s. in the pound had been paid to his creditors, the bankruptcy had been closed, the trustee released, and the trustee had handed over to the Official Receiver the record book and other documents (1).

(1) Bankruptcy Act, 1883, s. 80: "The trustee shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt may, subject to the control of the Court, personally or by his agent inspect such books."

Bankruptcy Rules, 1886, r. 285: "The official receiver, until a trustee is appointed, and thereafter the trustee, shall keep a book to be called 'the record book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meeting of creditors, or of the committee of inspection, and all such matters as may

be necessary to give a correct view of his administration of the estate, but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than a member of the committee of inspection."

Rule 292: "Upon a trustee resigning, or being released or removed from his office, he shall deliver over to the official receiver, or, as the case may be, to the new trustee, all books kept by him, and all other books, documents, papers, and accounts in his possession relating to the office of trustee."

In May, 1903, the debtor again applied for his discharge, which was refused by the Registrar, but eventually in December, 1903, the Court of Appeal made an order suspending his discharge for six years from 17 January, 1899.

On 5 May, 1904, the debtor applied to the Inspector-General in Bankruptcy for permission to inspect in the record book the minutes of a meeting of the committee of inspection held on February 23, 1899, and was referred to the Official Receiver.

He accordingly applied to the Official Receiver for such permission, but was informed by him that he was not entitled to an inspection of the minutes in question, but that it would be permitted him by way of indulgence. The debtor subsequently asked to see other minutes, and eventually asked for permission to search the entire record of minutes, letters, and other papers. This the Official Receiver refused to allow; and the Inspector-General declined to interfere with the exercise of the discretion of the Official Receiver. Thereupon the debtor made the present application to the Court for an order to be permitted to inspect all records of minutes of the meetings of the committee of inspection and copies of letters addressed to some of the creditors by the trustee.

In support of his application the debtor filed an affidavit from which it appeared that his object in seeking this inspection was to obtain material on which to found a charge of perjury against the trustee in the criminal proceedings in which the debtor had been convicted.

The Debtor in person.

Muir Mackenzie and *P. M. Francke*, for the Official Receiver :

It is contrary to the settled practice to allow a debtor to inspect the record book kept by the trustee, which contains confidential communications between the committee of inspection and the creditors. To allow such inspection would be to set a dangerous precedent. Section 80 of the Bankruptcy Act, 1883 (1), which directs the trustee in bankruptcy to keep proper books, provides only for their inspection by creditors, and is silent as to any right of the debtor to inspect.

The Debtor replied.

BIGHAM, J.: I think this application must be refused. It is apparently against the practice of the Court to permit a debtor to make an inspection of this kind, and the affidavit of the debtor does not satisfy me that there are any exceptional circumstances to justify in departing from the settled practice. I rather gather that the object of the application is to enable the debtor to formulate some grave charges that he alleges against the trustee; but I do not think I ought to depart from the practice of the Court, and allow the debtor inspection for that purpose.

Solicitor: *Solicitor to Board of Trade*, for the Official Receiver.

IN RE GREAVES, EX PARTE OFFICIAL RECEIVER.

1904, June 6. BIGHAM, J.

Bankruptcy—Practice—Consolidation of Proceedings—Administration of Estate of Deceased Partner—Bankruptcy of Surviving Partner—Bankruptcy Act, 1883, ss. 106, 108, 112, and 125.

An order may be made consolidating the proceedings in the administration in bankruptcy of the estate of a deceased member of a firm of two partners with the bankruptcy of the surviving member of the firm.

W. H. & C. GREAVES carried on business in partnership as stock-brokers. In February, 1904, W. H. Greaves died insolvent, and letters of administration to his estate with his will annexed were granted to his mother, who was one of his creditors. On 22 April an order was made by the Bankruptcy Court, on a creditor's petition, under section 125 of the Bankruptcy Act, 1883 (1), for the

(1) The Bankruptcy Act, 1883, s. 106, provides: "Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the Court may consolidate the proceedings, or any of them, on such terms as the Court thinks fit." Section 108 provides: "If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive." Section 112

provides: "Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the Court in which the first petition is in course of prosecution, and unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership,

administration in bankruptcy of the estate of W. H. Greaves, and the Official Receiver became the trustee. In the meantime—namely, on 11 March, 1904—a receiving order was made against C. Greaves, the surviving partner. He was subsequently adjudicated a bankrupt, and one Costello became the trustee in his bankruptcy.

The Official Receiver applied *ex parte* to the Court for an order that the proceedings in the two estates might be consolidated. It was admitted before the Registrar that there was no specific provision in section 125 of the Bankruptcy Act, 1883, dealing with the matter, and that there was no precedent for the application, whereupon the Registrar referred the matter to the Judge. The assets of C. Greaves were small, and the estate of W. H. Greaves was sworn at 2,500*l.* There were large claims against the partnership.

Muir Mackenzie, for the Official Receiver :

There is no provision in section 125 of the Bankruptcy Act, 1883 (1), which in terms deals with the subject-matter of this application, but under sections 106, 108, and 112 of the Bankruptcy Act, 1883, there would be an order for consolidation if both partners were now alive. The convenience of granting the present application is obvious.

[He referred to *New's Trustee v. Hunting* [1897] (2)].

BIGHAM, J.: I think that it was intended that in matters of procedure the same rules should so far as possible apply whether the person whose estate is administered were alive or dead. If this be so, then I think that sections 106, 108, and 112 enable me to accede to the present application. It will be obviously beneficial to all parties, if only as a saving of expense, that the two proceedings should be consolidated. There will be an order for consolidation, and Costello will act as trustee in the consolidated proceedings.

Solicitor : *George Tilling*.

and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just."

Section 125 enables the Court of bankruptcy to administer the estate of a person who has died insolvent.

(2) [1897] 2 Q. B. 19; 66 L. J. Q. B. 554; 76 L. T. 742; 45 W. R. 577; affirmed by the H. L., *sub nom.* *Sharp v. Jackson*, 6 Manson, 264; [1899] A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841.

IN RE ROWE, EX PARTE WEST COAST GOLD FIELDS,
LIMITED.

1904, June 6. BIGHAM, J.

Bankruptcy—Proof—Secured Creditor—Valuation of Security—Mistaken Estimate—Amendment of Proof—Bankruptcy Act, 1883, Sched. I. r. 10, Sched. II. rr. 13 and 14.

The debtor was a registered holder of fully and partly paid-up shares in the applicant company. At the time of proof the company had a first and paramount lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder. No value was set upon this lien in the proof. The articles of association were subsequently altered so as to give a lien on the fully paid-up as well as on the partly paid-up shares. The company sought to amend the proof by a fresh valuation of the security:—

Held, that as the company must, at the date when the original proof was carried in, have contemplated the possibility that the articles might be altered, it could not be said to have omitted to value the security from inadvertence.

ON 19 January, 1903, a receiving order was made against the debtor, who was subsequently adjudicated a bankrupt.

At the date of the receiving order the debtor was the holder of 1,800 partly paid-up shares of 1*l.* each and 3,500 fully paid-up shares of 1*l.* each in the West Coast Gold Fields, Limited. The company was registered on 4 February, 1901. Article 21 of the memorandum of association provided that the company should have a first and paramount lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder. On 8 January, 1903, the company made a call of 1*s.* per share on the 1,800 shares, and on 26 January, 1903, they lodged a proof against the debtor's estate for 900*l.* in respect of the same shares, being as to 90*l.* in respect of the call and as to 810*l.* in respect of the amount uncalled on the shares. This proof was rejected by the trustee, and on appeal to the Judge it was directed to be admitted for 819*l.* At the time this proof was made the company had under article 21 a lien on the 1,800 partly paid-up shares, which they did not value in their proof, but no lien existed in respect of the fully paid-up shares. In January, 1904, the trustee declared a dividend of 1*s.* 6*d.* in the pound, which was received by the company on their admitted proof.

On 20 February, 1904, the company in general meeting under section 50 of the Companies Act, 1862, passed a resolution that article 21 should be altered by omitting the words "not fully paid up," and this resolution was duly confirmed at a general meeting of the company held on 2 March following. The trustee did not attend these meetings nor vote on the resolution. This alteration of the article was intended to meet the case of the debtor and certain other shareholders of the company, and was also made with a view to the voluntary winding up of the company. In April the company went into voluntary liquidation. The liquidator, on behalf of the company, now applied that the company might amend their proof, or alternatively might withdraw it and lodge a fresh one, and set up as secured creditors the lien on the 3,500 fully paid shares which under article 21 as altered they had in respect of the amount due on the 1,800 partly paid shares. It appeared that on the winding up of the company there would be, after satisfying all the debts and liabilities of the company, surplus assets to return to the holders of fully paid-up shares a sum of about 8s. per share; and that the estate of the debtor would not realise more than a sum sufficient to pay a dividend of 1s. 6d. in the pound.

H. Reed, K.C., and Tyndale Davis, for the Applicants :

A shareholder takes his shares upon the footing that the terms upon which they were originally issued may be varied: *Allen v. Gold Reefs of West Africa* [1900] (1). The trustee in bankruptcy can claim no higher right than the bankrupt had. Rule 10 in Schedule I. to the Bankruptcy Act, 1883 (2) will work a

(1) 7 *Manson*, 417; [1900] 1 Ch. 656; 69 L. J. Ch. 266; 82 L. T. 210; 48 W. R. 452.

(2) Rule 10 in Schedule I. to the Bankruptcy Act, 1883, provides that if a creditor "votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence." In Schedule II. to the same Act, rule 13 provides: "Where a creditor has so valued his security, he may at any

time amend the valuation and proof on showing to the satisfaction of the trustee, or the Court, that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment

surrender of the security unless leave to amend be given under rules 18 and 14 of Schedule II.

P. M. Francke, for the trustee :

The lien is abandoned, and the debt satisfied by the proof: *Stammers v. Elliott* [1868] (8). Unless inadvertence be shown, there is no right to amend, and here there is no inadvertence: *In re Safety Explosives* [1904] (4).

[He was stopped.]

H. Reed, K.C., in reply, referred to *Ex parte Clarke* [1892] (5), *Ex parte Rhoades* [1899] (6), and *Ex parte Buenos Ayres and Pacific Railway* [1901] (7).

BIGHAM, J.: I am not disposed to allow this amendment. At the time proof of the debt was lodged, it was known, or must be taken to have been known, that there was the possibility of acquiring this security, if article 21 were subsequently altered, as it was by the resolution of 20 February, 1904, and if it was intended to amend the proof, upon the footing of a new valuation of the security, the right should have been reserved in the proof itself. The company might have valued it inaccurately, but, if so, they could afterwards have applied for leave to amend. I have come to the conclusion

without application to the Court"; and rule 14 in the same schedule provides: "Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, he shall be entitled to be paid out of any money for the time

being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment."

(3) L. R. 3 Ch. 195; 37 L. J. Ch. 353; 18 L. T. 1; 16 W. R. 489.

(4) 11 Manson, 76; [1904] 1 Ch. 226; 73 L. J. Ch. 184; 90 L. T. 331; 52 W. R. 470.

(5) 67 L. T. 232, 465; 40 W. R. 608; 41 *Ib.* 116.

(6) 8 Manson, 136; [1901] 1 Q. B. 655; 70 L. J. Q. B. 259; 84 L. T. 208; 49 W. R. 528.

(7) 6 Manson, 277; [1899] 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 47 W. R. 561.

that they elected to omit all reference to this security, and they have by their own act altered the position of matters. In my opinion it is not a case of inadvertence, and this application must be dismissed.

Solicitors : *R. F. Yeo ; Morley & Shireff.*



SAMUEL v. JARRAH TIMBER AND WOOD-
PAVING CORPORATION (1).

1904, February 16; May 16. H. L.

Company—Mortgage by Company of Debenture Stock—Clogging Equity of Redemption—Option to Mortgagee to Purchase at any Time within Twelve Months.

A stipulation in a mortgage of debenture stock, the advance being repayable at thirty days' notice on either side, that the mortgagee is to have "the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months"—

Held to be void upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

Decision of the Court of Appeal (2) affirmed.

THIS was an appeal from an order of the Court of Appeal (COLLINS, M.R., ROMER and COZENS-HARDY, JJ.), dated 11 February, 1903, affirming the decision of KEKEWICH, J., dated 18 June, 1902. The facts are stated in the judgments of Lord MACNAGHTEN and Lord LINDLEY.

P. O. Lawrence, K.C. (J. W. Manning with him), for the appellant:

There was no "clog" on the equity of redemption, as the option was independent of the mortgage, and exercisable whether or not there was a failure on the respondents' part to pay off the mortgage. The case is thus like *Reeve v. Lisle* [1902] (3), and wholly different from *Bradley v. Carritt* [1903] (4), where the collateral agreement was to subsist "always hereafter." There is nothing to make the stipulation bad before redemption, and the excess, if any, can be separated from what is valid. This really amounted to an agreement to lend a further sum on specified terms, and the whole contract is limited to the currency of the advance. The appellant is entitled to damages, if not to specific performance: *South African Territories v. Wallington* [1898] (5).

(1) *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, and Lord Lindley.

(2) 10 *Manson*, 296.

(3) [1902] A. C. 461; 71 L. J. Ch. 768; 87 L. T. 308; 51 W. R. 576.

(4) [1903] A. C. 253; 72 L. J. K. B. 471; 88 L. T. 633; 51 W. R. 636.

(5) [1898] A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545.

Warrington, K.C. (Martelli with him), for the respondents :

Any term restricting the right of redemption constitutes a clog on the redemption, and is void. In *Noakes & Co. v. Rice* [1901] (6) and *Bradley v. Carritt* (4), there was no interference with the right, but the result would have been to put the mortgagor in a worse position after redemption than he was before the mortgage. This was a loan on security, and the period of exercise of the option "within twelve months" might have exceeded the period of the loan. If this be not a case of a clog, it is at least an infringement of the doctrine "Once a mortgage, always a mortgage."

P. O. Lawrence, K.C., replied.

The House took time for consideration.

The LORD CHANCELLOR (Earl of Halsbury): I regret that in this case the state of the authorities leaves me no alternative other than to affirm the judgment of Mr. Justice KEKEWICH and the Court of Appeal. A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement the fact of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

LORD MACNAGHTEN: By letter dated 11 June, 1901, the appellant, Henry Samuel, offered to advance to the respondent company 5,000*l.* at 6 per cent. upon the security of 30,000*l.* first mortgage debenture stock of the company, subject to his having "the option to purchase the whole or any part of such stock at 40 per cent. at any time

(6) [1902] A. C. 24; 71 L. J. Ch. 139; 82 L. T. 62; 50 W. R. 305; 66 J. P. 147.

within twelve months." Other conditions were attached to the offer, but they are not material for the purpose of the present question. Then followed this provision :—"The advance to become due and payable with interest at thirty days' notice on either side." The offer was accepted by the company. The stock was duly created and registered in Samuel's name. Within the period of twelve months, and before the company gave notice of intention to repay the advance, Samuel claimed to purchase the whole of the mortgaged stock at the agreed price. Thereupon the company brought this action, asking for redemption and a declaration that the option was illegal and void. Both Mr. Justice KEKEWICH and the Court of Appeal decided in favour of the company. Having regard to the state of the authorities binding on the Court of Appeal, if not on this House, it seems to me that they could not have come to any other conclusion, although the transaction was a fair bargain between men of business without any trace or suspicion of oppression, surprise, or circumvention.

It is, I think, unnecessary to consider what the true construction of the agreement between Samuel and the company may be. The result would have been precisely the same if the agreement had in terms declared that the option was not to continue after repayment. The law undoubtedly is that a condition such as that in question, if legal and binding at all, must come to an end on repayment of the loan.

In the Court of Appeal the question was treated as governed by the principle, of which *Noakes & Co. v. Rice* (6) is a recent example, that on redemption the mortgagor is entitled to have the thing mortgaged restored to him, unaffected by any condition or stipulation which formed part of the mortgaged transaction. That principle, I think, is perfectly sound. But, in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. This latter rule, I think, is founded on sentiment rather than on principle. It seems to have had its origin in the desire of the Court of Chancery to protect embarrassed land-owners from imposition and oppression. And it was invented, I should suppose, in order to obviate the necessity of inquiry and investigation in cases where suspicion may be probable and proof difficult. I gather from some general observations made by Lord

HARDWICKE in *Mellor v. Lees* [1742] (7) that he would have been disposed to confine the rule to cases in which the Court finds or suspects "a design to wrest the estate fraudulently out of the hands of the mortgagor," and to cases of "common mortgage," that is, as I understand it, mortgage of land by deed. It will be observed that in the later case of *Toomes v. Consett* [1745] (8), which is often referred to for a statement of the rule, his Lordship speaks only of "a deed of mortgage"—an instrument which perhaps rather lends itself to imposition; for no one, I am sure, by the light of nature ever understood an English mortgage of real estate. In *Vernon v. Bethell* [1762] (9), Lord Chancellor NORTHINGTON, then Lord HENLEY, laid down the law broadly in the following terms:—"This Court, as a Court of conscience, is very jealous of persons taking securities for a loan and converting such securities into purchases. And, therefore, I take it to be an established rule that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them." This doctrine, described by Lord HENLEY as an established rule nearly 150 years ago, has never, so far as I can discover, been departed from since or questioned in any reported case. It is, I believe, universally accepted by text-writers of authority. Speaking for myself, I should not be sorry if this House could have seen its way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender. At the same time, I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived. I am, therefore, of opinion that the appeal must be dismissed with costs.

(7) 2 Atk. 494.

(8) 3 Atk. 261.

(9) 2 Eden, 110, 113.

LORD LINDLEY: The letter of 11 June, 1901, written by the defendant to the plaintiff company, contained an offer of a loan of 5,000*l.* to the company upon certain terms, and this offer and the terms proposed were accepted by the company by their letter in answer, dated 14 June, 1901. These two letters constituted an agreement between the parties. The main provisions are as follows, viz., first, that the defendant should forthwith lend the company 5,000*l.* at 6 per cent., redeemable on thirty days' notice by either party; secondly, that the defendant should have as security 30,000*l.* of the company's first mortgage debenture stock transferred to him; thirdly, that the directors of the company should elect a nominee of his on their board; fourthly, that the defendant should have the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months; fifthly, that he should have a further option—viz., in the event of the company at any time raising further capital or selling its undertaking for shares or stocks of another company, the defendant should have the option of underwriting the taking up of such new capital, or shares, or stocks at a commission of 10 per cent.

The first question is, What is the true nature of this agreement? Is it a mortgage with an option to purchase, or is it a conditional sale, or is it an agreement giving Samuel an option to hold the debenture stock as a mortgage or a purchase? It appears to me to be clearly a mortgage with an option to purchase. A loan of 5,000*l.* on security was what the company wanted, and what Samuel agreed to let the company have on terms. They were not bargaining for anything else. As soon as the 5,000*l.* was advanced, and the debenture stock was placed at Samuel's disposal, he was in the position of mortgagee of that stock. He had the rights of a mortgagee, and the company had the rights of a mortgagor. There was that reciprocity and mutuality of remedies which distinguish a mortgage transaction from a conditional sale and from other transactions more or less resembling a mortgage, but not really constituting a mortgage. The transaction was, in my opinion, a mortgage *plus*, amongst other things, an option to purchase, which, if exercised by the mortgagee, would put an end to the mortgagor's right to redeem—i.e., would prevent him from getting back his mortgaged property. This was the view taken by Mr. Justice KEKEWICH, and

by all the members of the Court of Appeal, and I am unable myself to view the transaction differently.

In *Lisle v. Reeve* [1901] (10), Mr. Justice BUCKLEY suggested some instances in which he considered a mortgagee might validly stipulate for an option to buy the equity of redemption; but although his decision was affirmed first by the Court of Appeal and afterwards by this House: *Reeve v. Lisle* (8), the affirmance proceeded entirely on the fact that the agreement to buy the equity of redemption was no part of the original mortgage transaction, but was entered into subsequently, and was an entirely separate transaction, to which no objection could be taken. It is plain that the decision would not have been affirmed if the agreement to buy the equity of redemption had been one of the terms of the original mortgage. The Irish case *In re Edwards' Estate* [1861] (11) is to the same effect.

I cannot help thinking that both parties intended that the two options to purchase the 30,000*l.* debenture stock and to underwrite further capital or debenture stock, if issued, were to be exercisable even after payment off of the 5,000*l.* But the decisions of this House in *Noakes & Co. v. Rice* (6) and *Bradley v. Carritt* (4) conclusively show that, whatever might have been intended, Samuel could not have been entitled to exercise either option after repayment of his loan. But these decisions and the previous decision of *Salt v. Marquis of Northampton* [1891] (12) emphatically recognise the old doctrine "Once a mortgage, always a mortgage," which is too well settled to be open to controversy. Lord HARDWICKE said in *Toomes v. Consett* (8), "This Court will not suffer in a deed of mortgage any agreement in it to prevail that the estate become an absolute purchase in the mortgagee upon any event whatsoever." But the doctrine is not confined to deeds creating legal mortgages. It applies to all mortgage transactions. The doctrine "Once a mortgage, always a mortgage," means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor

(10) [1902] 1 Ch. 53, 68; 71 L. J. Ch. 42; 85 L. T. 464; 50 W. R. 231.

(11) 11 Ir. Ch. R. 367.

(12) [1892] A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R. 529.

from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage. This principle is fatal to the appellant's contention if the transaction under consideration is a mortgage transaction, as I am of opinion it clearly is.

Then it was contended that, as the property mortgaged was debenture stock issued by a limited company, the case did not fall within the principle to which I have been referring. I confess my inability to follow the argument on this point. Debenture stock is usually a sum of money charged on the assets of the company issuing it. It may be redeemable or irredeemable, in which case it is not a mortgage at all. But, whether redeemable or irredeemable, it is capable of being made a security for money lent upon it. It can be mortgaged as well by the company which issues it as by an ordinary holder. I can discover no reason for treating a mortgage of debenture stock as something so different from other mortgages as to render the principle "Once a mortgage, always a mortgage," inapplicable to it.

In my opinion the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Dale, Newman & Hood*, for the Appellant.

H. Percy Becher, for the Respondents.

SHEPHEARD AND ANOTHER v. BROOME (1).

1904, March 14, 15; May 17. H. L.

*Company—Prospectus—Disclosure of Contracts—Companies Act, 1867, s. 38—
Directors' Liability Act, 1890, s. 3.*

Where the directors of a company enter into a contract with a promoter for the payment of services in the form of a bonus or commission of fixed amount, and the contract is subsequently rescinded and replaced by an undertaking that the promoter's claim to proper remuneration shall be honourably met by the directors, such contract and undertaking ought under section 38 of the Companies Act, 1867, to be disclosed in the prospectus, and in a case to which that section applies the directors are liable for non-disclosure to persons who have taken shares on the faith of a prospectus not mentioning either the contract or undertaking, but referring to certain other contracts as "the only contracts" to which the company was a party.

Decision of the Court of Appeal *sub nom.* *Broome v. Speak* (2) affirmed.

THIS was an appeal from an order of the Court of Appeal (COLLINS, M.R., ROMER and COZENS-HARDY, L.JJ.) affirming the decision of BUCKLEY, J. The question was whether the appellants were liable, as directors of the London and Northern Bank, for the non-disclosure of certain contracts in the prospectus.

The company was incorporated on 6 April, 1898, with a capital of 2,000,000*l.*, divided into 25,000 preference shares of 10*l.* each and 175,000 ordinary shares of 10*l.* each, for the purpose of carrying on the business of banking in all its branches. The promoter of the company was one Bowden, and on 9 May, 1898, an agreement was made between Bowden and the company under which the former was to receive 20,000*l.* as promotion money and preliminary expenses. In or about August, 1898, Bowden entered into negotiations for the acquisition by the company of the assets and business of the Leeds Bank. The purchase price of the Leeds Bank was to be 142,500*l.*, and a deposit was required of 10 per cent.—14,250*l.* On September 8, 1898, Bowden wrote to the general manager of the Leeds Bank that he had decided to pay the deposit. On 21 September, 1898, one John Daniel Haddock, purporting to act as trustee for the company, wrote to one Craig, who was a nominee of Bowden, a letter in the following terms:—"The London and Northern Bank, Limited,

(1) *Coram*, the Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord James of Hereford, and Lord Lindley.

(2) 10 *Mansou*, 38.

30—31, Clement's Lane, London, E.C., September 21, 1898. Charles Craig, Esq., Lawrence Buildings, Manchester. Dear Sir,—In consideration of your advancing me the sum of 14,250*l.* to enable me to pay the same to the Leeds Joint Stock Bank, Limited, as deposit on purchase of their undertaking and assets, and your taking the risks of forfeiture, I hereby agree to repay the same on the directors going to allotment or on October 30 next together with 7,500*l.* bonus for such loan.”

On 26 September, 1898, Haddock, purporting to act as trustee for and on behalf of the company, entered into an agreement with the Leeds Bank for the purchase by the company of the undertaking of the Leeds Bank for 142,500*l.*, to be satisfied as to the whole or part in cash or shares at the option of the Leeds Bank. On the same day Bowden paid to the Leeds Bank the deposit of 14,250*l.* On 27 September, 1898, the agreement was adopted by the board, and it was arranged that the adoption of the commission note should be recommended for confirmation at the next meeting of the board, when a fuller attendance of the directors might be present. Neither the appellant Shephard nor the appellant Clayton was present at the meeting of 27 September, 1898. On 1 October, 1898, another meeting of the board was held, at which the appellants, Shephard and Clayton, were both present, when the following resolution was passed:—“That, in consequence of Mr. Craig having found the deposit at his own risk, the board agrees to repay the same with a bonus of 7,500*l.* if the directors go to allotment and when the purchase is completed.” On 1 October, 1898, a letter was written to Craig, the secretary of the London and Northern Bank, in the following terms:—“Dear Sir,—I am instructed to acknowledge the receipt of your letter of the 21st ult., which I placed before my directors at their meeting to-day, and to say that, in consequence of your having introduced the business and carried through the negotiations and found the deposit in connection with the purchase of the Leeds Joint Stock Bank, Limited, my directors agree to repay you the same together with a bonus of 7,500*l.*”

Strong objections having been made to the payment of the 7,500*l.* bonus, a meeting between the directors of the company and the directors of the Leeds Bank was held on 10 October, 1898, and at the meeting the following resolution was passed:—“That after full

discussion and hearing the views of the directors of the Leeds Joint Stock Bank, Limited, and upon the chairman giving Mr. Bowden his assurance that his right to receive proper remuneration for commission on introducing the business of the Leeds Joint Stock Bank, Limited, and raising the necessary deposit shall be honourably met at a future meeting of the directors of the London and Northern Bank, Limited, it is resolved, with the assent of Mr. C. E. Craig, that the contract contained in the letter of September 21, 1898, be cancelled, and that the subject be adjourned to a future meeting of the board." At the same meeting the prospectus, proofs of which had already been printed, was altered by striking out the reference to the letter of September 21, 1898, which it had previously contained. It stated that the only contracts to which the bank was a party were those of 9 May, 1898, and 20 September, 1898. On 18 October, 1898, Craig wrote to Haddock:—"Referring to the letter which you wrote to me dated September 21, 1898, I understand that the directors of the London and Northern Bank have passed a resolution to the effect that the claim which I may have for commission in introducing the business of the Leeds Joint Stock Bank, Limited, or for raising the necessary deposit, shall be honourably and properly met. Having regard to that assurance, I am quite willing to agree to the terms of your letter to me being cancelled and the arrangement there suggested being considered at an end."

On 20 October, 1898, a meeting of the board took place, at which both the appellants, Shepheard and Clayton, were present, and the prospectus as altered was adopted, and it was resolved to issue it, and the same was in fact issued on that day.

BUCKLEY, J., and the Court of Appeal held that the true effect of the resolution of 10 October, 1898, was to substitute an agreement to pay a *quantum meruit* for the agreement to pay the fixed sum of 7,500*l.* under the letter of 21 September, 1898. The only distinction between the case of the appellant Shepheard and the appellant Clayton was that the appellant Shepheard was, and Clayton was not, present at the meeting of 10 October, 1898.

On or about 24 October, 1898, the plaintiff applied for 400 ordinary shares of 10*l.* each in the company, which were allotted to him on 26 October, 1898. The company went into voluntary liquidation on 29 December, 1899, and the winding up was ordered

to be continued under the supervision of the Court by an order made 17 December, 1900. The plaintiff (respondent) brought his action for damages for the non-disclosure of the contracts relating to the commission or bonus agreed to be paid to Bowden. The Courts below gave judgment in his favour.

Haldane, K.C., and Cassel, for the appellants :

The alleged contracts relied on by the respondent were not legally complete or binding, and in fact were not contracts at all within the meaning of section 38 of the Act of 1867. They were not material, and their disclosure or non-disclosure could not have affected the mind of any intending shareholder. The statute only requires that the names and dates of the contracts should be disclosed, not the substance. Then the words are "knowingly issue," which in *Twycross v. Grant* [1877] (3) was held to mean "intentionally" issue, and it was held that the intention might be said to exist though the directors believed it was not necessary to disclose. But a protection against rogues ought not to be converted into a trap for the honest, and directors have not been made insurers. Some effect ought to be given to the waiver clause, otherwise directors are exposed to dangers which they cannot reasonably be expected to foresee. A director might be anxious to comply with the section, and, as was done here, take the best advice as a precaution against possible omissions, and draw a waiver clause. Why should not shareholders be bound by such a clause, and why should a director be exposed to ruin on account of an honest mistake? The word "knowingly" is of most frequent occurrence in criminal statutes, and has always been held to import *a mens rea*. To sustain an action under the section there must at least be such materials as would be required in an action of deceit. There was here no such intentional concealment as is contemplated by the statute. It is said that ignorance of law is no excuse; but Lord WESTBURY in *Cooper v. Phibbs* [1867] (4) restricted the maxim to the general law. It cannot be applied to a particular statute, much less to the construction of a contract, which in truth is matter rather of fact than of law; see *per* Lord CHELMSFORD in *Earl*

(3) 2 C. P. D. 469; 46 L. J. C. P. 636; 36 L. T. 812; 25 W. R. 701.

(4) L. R. 2 H. L. 149, 170; 16 L. T. 678; 15 W. R. 1049.

Beauchamp v. Winn [1873] (5). In any case some limitation must be placed on section 88; see *per* BRAMWELL, L.J., in *Twycross v. Grant* (6). The extent of that limitation is dealt with by THESIGER, L.J., in *Sullivan v. Mitcalfe* [1880] (7). It is not shown that the respondent suffered any damage, and damage must be proved.

[They also cited *Peek v. Gurney* [1878] (8), *Cackett v. Keswick* [1902] (9), and *McConnell v. Wright* [1903] (10).]

Astbury, K.C., and *Roskill, K.C.*, for the respondent:

The contract of 21 September, 1898, was not rescinded; it was only modified, and other terms substituted. That contract was material, and the subsequent arrangement of new terms was equally material, and all this was intentionally concealed. It is not necessary to sustain the action to show that the suppression of these facts tended to operate on the minds of intending shareholders. It was a statutory duty to disclose. The appellants cannot rely on ignorance of the law, for they consulted counsel, nor can they, as in *Derry v. Peek* [1889] (11) the appellants successfully did, plead ignorance of the facts.

Haldane, K.C., replied.

The House took time for consideration.

The LORD CHANCELLOR (Earl of Halsbury): In this case I take the same view which both Mr. Justice BUCKLEY and the Court of Appeal have taken as to what the evidence proves; and to my mind it is quite immaterial to go through the whole narrative of events which have been carefully analysed by Mr. Justice BUCKLEY.

(5) L. R. 6 H. L. 223, 234; 22 W. R. 193.

(6) 2 C. P. D. 496 *et seq.*; 46 L. J. C. P. 647 *et seq.*; 36 L. T. 812; 25 W. R. 701.

(7) 5 C. P. D. 455; 49 L. J. C. P. 815; 44 L. T. 8; 29 W. R. 181.

(8) L. R. 6 H. L. 377; 43 L. J. Ch. 19; 22 W. R. 29.

(9) 9 Manson, 388; [1902] 2 Ch. 456; 71 L. J. Ch. 641; 87 L. T. 11; 51 W. R. 69.

(10) 10 Manson, 160; [1903] 1 Ch. 546; 72 L. J. Ch. 347; 88 L. T. 431; 51 W. R. 661.

(11) 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 36 W. R. 33; 1 Meg. 292, 54 J. P. 148.

It comes practically to this: that the defendants issued a prospectus with the knowledge in their minds that certain contracts had been entered into which were not referred to or stated in the prospectus. That the contract in question was not material, I should have thought, was hardly arguable; and, indeed, once the facts are understood, it is very difficult to argue that "he" (in the language of Lord Justice ROMER) "did not appreciate the legal effect of the circumstances which he knew, or did not understand that those circumstances caused such a liability to be cast upon the company as had to be set forth in the prospectus under section 38." It is hardly necessary to add that, if that is the true result of the evidence, no advice given him by any one can relieve him from the consequences of being a party to that prospectus.

I feel with Lord Justice COZENS-HARDY that it is a painful duty to be obliged to treat that as fraudulent which in truth was not fraudulent; but section 38 of the Act of 1867 compels us to say that it shall be deemed to be fraudulent. The statute, rightly or wrongly, contemplated the possibility of there being no actual fraud, and intentionally enacted that, even if there were no fraud in the ordinary sense, yet if the facts established the issue of a prospectus which did not mention a contract under the circumstances contemplated by that section, and which exist in this case, such prospectus should be deemed fraudulent.

While, therefore, I quite agree with every Judge who has dealt with this case that it would be wrong to attribute fraud to Shepheard, yet I cannot doubt that his act has brought him within the section of the Act of Parliament, and accordingly, therefore, that this appeal must be dismissed with costs.

LORD MACNAGHTEN: I am of the same opinion. I should have been very glad if it had been possible to relieve the appellants from the consequences of what has occurred, but I see no reason to differ from the conclusion of the Courts below. I must say I am very sorry for them.

LORD JAMES OF HEREFORD: It is with great regret that I have come to the conclusion that this appeal must be dismissed. There

certainly seem to be two documents, a letter of 21 September, 1898, and a resolution of 10 October, 1898, which were material and important in the interests of the company and its shareholders. That the appellants knew of them is admitted; and, that being so, the Directors' Liability Act, 1890, renders the directors issuing a prospectus which omits to refer to such contracts liable in damages. That the appellants took the best advice they could obtain upon the disclosure that should be made in the prospectus and have acted in perfect good faith, with the fullest intention and desire to omit nothing they ought to have disclosed, does not afford any defence against an action founded upon this statute. .

I think also that, a *prima facie* cause of action being established, the plaintiff must be afforded an opportunity by inquiry of showing whether he has sustained any damage. I express no opinion whether the facts established at the hearing do or do not sustain a claim for damages.

LORD LINDLEY: It is impossible not to sympathise with the appellants in this case, but I cannot say that the decision from which they have appealed is wrong in point of law. The Acts of Parliament which they have been held to have infringed are very stringent, and are not very happily expressed. To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify this House in refusing to hold the appellants responsible for acts for which an Act of Parliament clearly declares they are to be held liable. They are said to have infringed two statutory enactments: viz., section 38 of the Companies Act, 1867, and section 3 of the Directors' Liability Act, 1890. The first of these has happily been repealed; but its repeal was too late to render the Act inapplicable to this case. The appellants are alleged to have infringed these enactments by not noticing in a prospectus certain letters and resolutions of the board which ought to have been referred to in it, and especially a letter of 21 September, 1898, and a resolution of 10 October of the same year. There can, in my opinion, be no doubt that these letters and resolutions were extremely material and ought not to have been suppressed. The appellants knew of their existence, but they

honestly believed that it was unnecessary to refer to them. They took legal advice on the subject, but whether they were wrongly advised or whether they misunderstood the advice given is not clear. If the case had turned only on section 38 of the Act of 1867 it would have become necessary to consider the effect of the waiver clause inserted not only in the prospectus, but also in the applications for shares. But it is not necessary to decide this question, for the waiver clause has no application to the appellants' liability under the Directors' Liability Act of 1890.

The prospectus unfortunately stated a fact which was not true, viz., that the only contracts to which the bank was a party were the two which were mentioned in it. This untrue statement brings the case clearly and unmistakably within section 3, sub-section 1, of the Directors' Liability Act, 1890. It is contended for the appellants that they are not liable under this Act because they had reasonable ground to believe, and did believe, that the statement in the prospectus was true. But they knew of the documents, and they knew they were not disclosed; they thought they were not such as required disclosure. This is a question of law; and I agree with Mr. Justice BUCKLEY and the Court of Appeal that a mistake of this kind does not furnish a defence to an action founded on the statute in question. *Twycross v. Grant* (3) is an authority in favour of this view, although it turned on the Act of 1867.

It was then contended that there was no evidence that the plaintiff, who took shares on the faith of the prospectus, had sustained any damage by reason of the untrue statement contained in it. The company failed about a year after it was formed, and the plaintiff has lost the money he paid for his shares. This appears to me to be sufficient *prima facie* evidence of some damage sustained by the plaintiff by reason of the untrue statements in question. All that has been done by the Court as yet has been to decide that the plaintiff has proved enough to entitle him to an inquiry as to the amount of damages which he has sustained by reason of such statements. This is quite in accordance with the usual practice in actions of this kind when brought in the Chancery Division, and it is extremely convenient. It saves the trouble and expense of going into evidence which will be

useless if the plaintiff fails to establish any liability of the defendant to him.

The appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Waterhouse & Co.*, for the Appellants.

Rowcliffes, Rawle & Co., agents for *Cooper & Sons*,
Manchester, for the Respondent.

IN RE STRAND WOOD CO.

1904, May 31; June 1. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

*Company—Winding-up—Practice—Misfeasance Summons—Security for Costs by
Liquidator—Companies (Winding-up) Act, 1890, s. 10.*

The practice of the Court is not to order a liquidator of a company in winding-up to give security for costs on a summons by him under section 10 of the Companies (Winding-up) Act, 1890. It will, however, in a proper case, make an order against him personally for the costs of such an application.

The principle of *Cowell v. Taylor* (1) applied.

THIS was an appeal from the decision of Mr. Registrar Hood.

At extraordinary general meetings of the company held on 21 January, 1902, and 6 February, 1902, respectively, special resolutions were passed and confirmed for the voluntary winding-up of the company, and appointing a liquidator.

On 19 April, 1904, the liquidator took out a summons against certain of the directors of the company seeking to make them liable for certain moneys of the company alleged to have been misapplied by them. On 28 April two of the respondents to that summons took out a summons asking that the company and the liquidator might be ordered to give security for costs. The Registrar refused to make any order on the application. The appeal was from that refusal.

The ground of the application was that the Strand Wood Co. had no assets, the whole of its property having been transferred on

(1) 31 Ch. D. 34; 55 L. J. Ch. 92; 53 L. T. 483; 34 W. R. 24.

reconstruction to a new company formed for that purpose, and that the liquidator was, as the appellants were informed and believed, a man of no financial position. The answer of the liquidator was that he retained control of the greater part of the assets of the company pending the discharge of outstanding liabilities, which assets would be available for costs, and the new company had sanctioned the issue of the summons, and that it was not true that he was a man without property.

A. H. Jessel, for the appellants :

The Court has jurisdiction in a proper case to order a liquidator to give security for the costs of a misfeasance summons. *PEARSON, J.*, made such an order in *In re Wedgwood Co.* [1884] (2), and *BACON, V.-C.*, in *In re Seventh East Central Building Society* [1884] (3).

[*ROMER, L.J.* : As at present advised, I do not assent to that.]

It is analogous to the case of a limited company, which, when plaintiffs, can be ordered to give security under section 69 of the Companies Act, 1862. In *In re W. Powell & Sons* [1896] (4), *ROMER, J.*, seems to have assumed that there was jurisdiction to make the order. He declined to order security in that case, but he did so on the ground that the Court at the trial might order the liquidator to pay the costs personally ; and he also thought that, in considering whether the liquidator ought to be ordered to pay the costs personally, the Court would have regard to the fact that the liquidator had opposed an application for security. That has since been followed by *STIRLING, J.*, in *In re Western Counties Steam Bakeries and Milling Co.* [1896] (5) ; see *Palmer's Company, Precedents* (9th ed.), Part II. pp. 632, 633.

[*ROMER, L.J.* : The principle of *Cowell v. Taylor* [1885] (1) is against the appellants.]

(2) May 29, 1884, unreported.

(3) 51 L. T. 109.

(4) 3 *Manson*, 53 ; [1896] 1 Ch. 681 ; 65 L. J. Ch. 454 ; 74 L. T. 220 ; 44 W. R. 618.

(5) May 4, 1896, unreported.

In *In re W. Powell & Sons* (4), it was argued that the Court had no jurisdiction to order a liquidator to give security, but it was not so held.

[ROMER, L.J.: It appears to me now, though it did not occur to me at the time, that I might have based my decision upon want of jurisdiction.]

In this case the liquidator is a mere shadow, and the company will get no benefit by his action, as it has sold its undertaking to another company. That brings this case within the exception stated by BOWEN, L.J., in *Cowell v. Taylor* (1).

Mark Romer, for the liquidator, was not called upon.

VAUGHAN WILLIAMS, L.J.: I am afraid that the practice is against the appellants, and the appeal fails.

I wish to say for myself that, if this were a new matter, inasmuch as I personally while acting as the Judge in company matters saw many instances of the abuse of the present law, I should not have been sorry if there had been a power to require security to be given in a case of this kind where the circumstances were such as to lead the Court to think that it ought to be ordered. The cases, however, are too strong for me, and we must be content with the practice as it stands.

ROMER, L.J.: I think that the appeal fails, and must be dismissed. The case comes within the principle of *Cowell v. Taylor* (1). The liquidator comes here under the Act of Parliament and in the performance of his statutory duties; and in a case like that, where it is not suggested that the application is frivolous or made improperly by the liquidator, he is not, in accordance with the practice of this Court, bound to give security for costs.

COZENS-HARDY, L.J.: I agree. It is clear that this case does not come within section 69 of the Companies Act, 1862. Here the company is not the plaintiff; but it is agreed that by analogy, where the liquidator comes under the express provisions of section 10 of the Companies Act, 1890, we ought to treat him as being in the

same position as a plaintiff company. I cannot follow that. As a general rule, the practice as to security for costs is settled by *Cowell v. Taylor* (1), and other cases. It seems to me that we should be going beyond that authority if we required the liquidator here to give security for costs.

I wish to emphasise what was said by Lord Justice ROMER in *In re W. Powell & Sons* (4), that the Court on a misfeasance summons will not have the least hesitation in making a personal order for payment of costs by the liquidator in a proper case.

Appeal dismissed.

Solicitors: *Arthur J. Benjamin*, for the Appellants.

Bisgood & Marshall, for the Liquidator.

MOSELEY v. KOFFYFONTEIN MINES, LIMITED.

1904, May 12, 20. C. A. VAUGHAN WILLIAMS, STIRLING, AND
COZENS-HARDY, L.JJ.

Company—Shares—Issue at a Discount—Debentures Issued at a Discount—Option to Exchange Debentures for Fully Paid Shares at 1l. Share for 1l. of Debenture—Validity of Scheme.

A company proposed to issue debentures for 100l. each at 80l. per debenture, the principal sum to be repaid on 1 November, 1909, or such earlier date as the same might become payable under the conditions of the debentures. The circular announcing the issue contained this clause:—“Debenture-holders will have the right at any time prior to 1 May, 1909, to exchange their debentures for fully paid shares in the company at the rate of one 1l. fully paid share for every 1l. of the nominal amount of the debentures.” Under the conditions of the debentures the principal sum was to be immediately repayable in the event of the registered holder of the debenture giving the company notice in writing directing it to allot to him fully paid shares in exchange for the debenture in accordance with this scheme:—

Held (reversing the judgment of BUCKLEY, J.), that the scheme as it stood might be made use of for the purpose of acquiring fully paid shares of the nominal value of 100l. by the payment of 80l. only, and it was open to abuse, and an injunction ought to be granted restraining the issue of the debentures pursuant to the scheme.

THE defendant company proposed to issue 85,000 5 per cent. first mortgage debentures at 80l. per 100l. debenture, and the circular

announcing this issue contained this clause: "(D) Debenture-holders will have the right at any time prior to May 1, 1909, to exchange their debentures for fully paid shares in the company at the rate of one *l.* fully paid share for every *l.* of the nominal amount of the debentures."

The principal moneys secured by the debentures were covenanted to be repaid on 1 November, 1909, or such earlier date as the same might become payable in accordance with the conditions of the debentures. Condition 8 of the debenture trust deed provided that the principal moneys should immediately become payable in the event, among others, of the registered holder giving to the company a direction in writing under condition 10, which was as follows: "The registered holder hereof may at any time prior to the 1st of May, 1909, direct the company in writing addressed to it at its registered office for the time being, to allot and issue to him in exchange for and in satisfaction of this debenture fully paid shares of the company [*sic*] capital" (as distinguished from life governors' shares) "of the company, at the rate of one share of *l.* for every *l.* of the nominal amount of the debenture, and the company shall after the surrender of this debenture comply with such direction."

The plaintiff, in an action on behalf of himself and all other shareholders in the company, moved to restrain the company and its directors until the trial of the action or further order from carrying into effect the proposed allotment of debentures pursuant to the scheme set forth in the circular, and from proceeding with the issue of any debentures pursuant thereto.

The motion came before BUCKLEY, J., on 6 May, 1904.

Buckmaster, K.C., and H. Greenwood, for the plaintiff.

Neville, K.C., Astbury, K.C., and J. W. M. Holmes, for the defendants.

BUCKLEY, J.: An action is here brought by one shareholder, suing on behalf of himself and all other shareholders, to restrain the company and its directors from carrying out a particular issue of debentures which is contemplated, and the terms of which are stated in a circular dated 25 April, 1904. There is no question as to the powers of the directors. The question is whether the bargain

which they propose to make is *ultra vires*, as involving the issue of shares at a discount, which, of course, the corporation cannot legally make. The whole question therefore turns on Clause D of the terms of issue.

The first cardinal fact upon which I proceed is this: that it seems to me that this scheme is not a colourable device for the purpose of the issue of the shares at a discount. If it were so, I should regard it from a very different point of view. The facts as regards the value of the shares are these: Their present market price is about three-eighths or a half of their face value, but the plaintiff says (and I will take it that it is so) that that is to a large extent a nominal price; that the purchase of a few shares or the sale of a few shares would send the price very much up or very much down; and that, although that is the price to-day, it may be very much altered to-morrow. I also take into account that the plaintiff says that, after he has made investigation into various matters, it is likely that he may be able to carry through a proposal to issue a considerable further number of shares at par. Taking all those facts into consideration, it seems to me that the transaction here proposed is not colourable; it is not a mere device under which the company is going to take 80*l.* with the intention, or expectation, or reasonable probability that the holders of debentures for that 80*l.* will come to-morrow, or next week, or within the next six months, and say, "Give us 100*l.* worth of shares." I am quite satisfied that that is not, in the state of facts, a thing that was ever contemplated or is likely to happen. That being so, finding it not to be a colourable transaction, I have to look to see what the nature of it is. Now the nature of it is that the company is to receive 80*l.*, and for that is to issue debentures for 100*l.*, which are to be redeemable at par in November, 1909, so that the company comes under a liability to pay at a subsequent date 100*l.* Clause D, the clause in question, is this: "Debenture-holders will have the right at any time prior to 1 May, 1909, to exchange their debentures for fully paid shares in the company at the rate of 1*l.* fully paid share for every 1*l.* of the nominal amount of the debentures." Now, if any person, having taken his debentures, exercised that right to-day, the day after he gets his debenture he would only get three-eighths or a half—50*l.* or something less than 50*l.* worth of

shares for his 80*l.* Of course he will not do that if he is a wise man; it is not likely that he will. The scheme, therefore, is not illusory. Then what does he get, having regard to Clause D? It seems to me that the matter may be regarded in either one of two ways. The debenture-holder either obtains for 80*l.* a debt of 100*l.* payable in 1909, or in an event, at an earlier date, in which case he is to invest the money in shares; or he becomes entitled to a 5 per cent. investment constituting property which he is to be entitled to exchange for 100*l.* worth of shares in the company. If it be the first case, and the bargain be not illusory, but real, then at the anticipated date of repayment the 100*l.* will honestly become due to him, because there has been reserved to him the right to ask for his 100*l.* earlier, if he is minded to invest it in a particular way. Taking that 100*l.*, he would buy 100*l.* worth of shares with it, and there would be no issue of shares at a discount. If the other view be the true view (and I rather think it is the better view), if what he holds is an obligation of the company to pay at a postponed time, which obligation he is entitled to exchange for 100*l.* worth of fully paid shares in the company, then those shares are not going to be paid for in cash at all; they are going to be paid for in property. The cases of *Ooregum Gold-mining Co. of India, Limited v. Roper* [1892] (1) and *In re Wragg, Limited* [1897] (2), have established this: that it is competent for a company to receive payment for shares in property which the company agrees to take as of a value irrespective of what may be the intrinsic or real value of the property. As to that, Lord WATSON in the *Ooregum Case* (1) says: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value

(1) [1892] A. C. 125, 136; 61 L. J. Ch. 337, 344; 66 L. T. 427; 41 W. R. 90.

(2) 4 Manson, 179; [1897] 1 Ch. 796; 66 L. J. Ch. 419; 76 L. T. 397; 45 W. R. 557.

for its shares. The Court would doubtless refuse effect to a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined." Then he goes on to point out that the rule is calculated to induce companies to pay extravagant prices for goods in order to set them off against shares, and adds, "The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice."

Speaking for myself, I am exceedingly conscious of the danger there is, having regard to the doctrine established by these cases, that a door may be opened for shares to be issued at less than their nominal value at a discount. The principle of law as established is, that if that transaction be not colourable, a transaction of giving property fairly taken by the company as being equivalent to the nominal value of the shares, then it is good. It seems to me here that the property for which the exchange is to be made, reading this clause in the latter sense, is one within that principle. It follows from this that the transaction was not, in my judgment, within the rule prohibiting the issue of shares at a discount. I must therefore refuse to make any order on the motion.

The plaintiff appealed.

Buckmaster, K.C., and *H. Greenwood*, for the plaintiff:

Under this scheme the debenture-holders can compel the company to do something which is in effect an issue of shares at a discount. It is, therefore, illegal, and the Court cannot consider the probability of its being carried out. The shares may be at present below par, but a year ago they stood at 30s. for the 1l. share, and a very few purchases make them rise in the market. They fluctuate according to the sales or purchases. A successful half-year would also send up the shares. This is not like the cases where a company agrees to take payment for shares in property, in which, so long as the company is acting honestly, the Court will not inquire into the adequacy of the consideration: *Ooregum Gold-*

mining Co. of India v. Roper (1), *In re Theatrical Trust, Limited, Chapman's Case* [1895] (3), and *In re Wragg, Limited* (2). That applies where the thing given has no fixed money value. In that case the Court allows the parties to put their own value upon the property; but where there is a definite money measure fixed by the contract it will be invalid if the money value of what is to be given in exchange for the shares is less than the par value of the shares: *In re Almada and Tirito Co.* [1888] (4) and *Welton v. Saffery* [1897] (5).

[COZENS-HARDY, L.J., referred to *Spargo's Case, In re Harmony and Montague Tin and Copper Mining Co., Limited* [1873] (6).]

The debenture-holders here have not to wait till the debentures are at par to make the exchange. They may do it the very day that they are registered. The honesty of the transaction is not the question, but whether under the scheme it is possible for a man on the payment of 80*l.* to obtain 100*l.* of shares. If so, it is an issue of shares at a discount, and invalid, whatever the intention may have been. The debenture-holders can get as many shares as they please by paying 80*l.* for 100*l.* of shares. They are really given a bonus of 20*l.* of shares for each debenture for which they subscribe.

Neville, K.C., Astbury, K.C., and J. W. M. Holmes, for the defendants:

It is essential to see what the contract really is. The proposal is not to issue shares, but debentures, at a discount, and there is nothing wrong in that so long as it is *bonâ fide*. Shares cannot be issued at a discount, because under section 38 of the Companies Act, 1862, a shareholder must pay the full face value of his shares except so far as he has already paid. That does not apply to

(3) 2 Manson, 304; [1895] 1 Ch. 771; 64 L. J. Ch. 488; 72 L. T. 461; 43 W. R. 553; 13 R. 462.

(4) 38 Ch. D. 415, 423; 57 L. J. Ch. 706, 711; 59 L. T. 159; 36 W. R. 593; 1 Meg. 28.

(5) 4 Manson, 269; [1897] A. C. 299, 306; 66 L. J. Ch. 362, 364; 76 L. T. 505; 45 W. R. 508.

(6) L. R. 8 Ch. 407; 42 L. J. Ch. 488; 28 L. T. 153; 21 W. R. 306.

300 MOSELEY v. KOFFYFONTEIN MINES, LIMITED. [MANSON,

debentures. As soon as a debenture-holder is registered the price that he has given for his debenture is immaterial if the transaction is honest, and it is only a registered debenture-holder who can make use of the provisions of condition 10 of the debenture trust deed. The transaction is really an issue of 100*l.* of shares in exchange for the company's debt of 100*l.* That is not an issue at a discount. If the debenture-holder sought to enforce his claim there would be a counterclaim by the company under the agreement to take shares, and a set-off. That would be within the principle of *Spargo's Case* (6).

No doubt a 10*l.* share cannot be issued fully paid for 5*l.* when the consideration is a money consideration, but when it is not money, any other consideration will support an issue of fully paid shares, and if the transaction is honest the Court will not go into the adequacy of the consideration. The consideration here is not cash; it is a *chose in action*. The obligation of the company is none the less to pay 100*l.* because the debentures are issued at 80*l.*, and until the debenture-holders receive their 100*l.* no shareholder can receive anything in a winding-up. Under this contract a hundred shares can never be obtained without either paying 100*l.* for them, or giving property the exact value of which is not material.

Buckmaster, K.C., replied.

Cur. adv. vult.

May 20.

VAUGHAN WILLIAMS, L.J., read his judgment, in which, after stating the facts, he continued as follows: The basis of the motion was that the issue of debentures, according to this scheme, constituted, or at all events would cover, the issue of shares at a discount—that is to say, one hundred 1*l.* shares fully paid at a price of 80*l.* There is, of course, no doubt about the obligation of shareholders to pay to the company the full amount of their shares, as Lord MACNAGHTEN pointed out in *Ooregum Gold-mining Co. of India v. Roper* (1), continuing as long as anything remains unpaid on their shares; but the liability as the law now stands, and as it stood in 1862, can be discharged by payment in money or, with the consent of the company, by payment in money's worth, and the Court will not, if there is a valid contract—which since the repeal of section 25 of the Act of

1867 no longer requires registration—by the company for the acceptance of something of substantial value as money's worth, inquire into the adequacy of the consideration ; see *In re Wragg, Limited* (2). But the cases decide that a man must really pay for the shares ; and, further, that, if the contract makes it manifest on its face that the taker of the shares is paying less than their nominal cash value, he may be liable for the balance. If the consideration is illusory, or if it permits an obvious money measure to be made showing that discount was allowed, or if the shares are openly issued at a discount, the shareholder may be called on to pay the balance in cash. It seems obvious, therefore, that, if the company propose to issue shares under conditions which disclose any of the features to which I have referred, the person getting the allotment of shares would pay for them less than their nominal cash value ; such an issue ought to be restrained.

Now it seems to me in the present case that the immediate consideration for the issue of shares to a debenture-holder demanding such allotment in exchange for or in satisfaction of his debenture is clearly the surrender of the debenture, and the mere fact that the debenture was purchased at a discount of 20 per cent. will not afford an obvious money measure showing that a discount was allowed in the price of the shares. Test it in this way : Suppose the debentures to have been issued at a discount of 20 per cent., and subsequently, quite independently of any contract at the time of the issue of the debentures, the company is minded to buy up as many of the debentures as the debenture-holders will sell, allotting one hundred 1*l.* shares in exchange for a 100*l.* debenture, could it possibly be said that those shares were issued at an obvious discount ? I think not. The surrender of the 100*l.* debenture might well be of the full money's worth of 100*l.* cash, and in the great majority of cases would be so.

The question, therefore, arises, Does it make any difference that the bargain to issue the one hundred 1*l.* shares in exchange for the 100*l.* debenture issued at the price of 80*l.* was part and parcel of the consideration for the issue of the 100*l.* debenture at the price of 80*l.* ? It seems to me that such a bargain might be a very good bargain for a company to make which wished to borrow on debentures a large sum of money required for the development of the enterprise

of the company. It is true, however, that it might be a very bad bargain for the company, and, what is really essential, such a bargain might enable the debenture-holders who claim the allotment of shares to escape the statutory obligation to pay the full nominal amount of their shares. If the debentures were exchanged for shares immediately after the issue of the debentures, the practical result would be that the shares, although nominally issued in exchange for the surrender of debentures, would really be issued at a discount—that is, one hundred *l.* shares for a payment of 80*l.* The answer given by the company to this is, that, as a matter of business, no man would surrender a 100*l.* debenture, which would always be entitled to payment in full before the shareholders could touch a penny, in exchange for one hundred *l.* shares unless and until such shares were selling at par in the market, and probably not unless and until such shares were at a premium. It is said in answer to this that it is not impossible, especially as the circular contemplated the issue of debentures to shareholders, that such shareholders might, for the purpose of Stock Exchange operations, exchange immediately their debentures for shares. The fact, however, clearly appears that the bargain referred to in the circular has this blot: that it might result in shares being issued practically at a discount.

I think that the real question is, Does this bargain give to the company that which the company as business men might fairly regard as money's worth for the full nominal value of the shares? It is not sufficient for the company to say the bargain was made in good faith. The company must at least establish that there is no obvious money measure on the face of this bargain showing that the shares were issued at a discount. Is this money measure made obvious by the fact that the company binds itself at any time after the issue of the debentures to allot shares to the full nominal value of the debentures, although those debentures were issued at a discount of 20 per cent.? The case is on the border-line; but I am inclined to think that Mr. Justice BUCKLEY ought to have issued the injunction asked for, on the ground that the issue of debentures on the proposed terms was open to abuse, even if the agreement was not illusory, but a real agreement honestly made.

[His Lordship then ceased reading and continued as follows:] I

desire to add a few words before I leave this case. It has been established long ago that the obligation of a shareholder to pay the full nominal amount of his shares need not be satisfied in cash, but might be satisfied in money's worth. It has also been held that the Court will not, if satisfied that there is an honest bargain under which money's worth has been given for the shares, inquire into the adequacy of the consideration. These two propositions have been established by decisions of the highest tribunal, and I do not suggest that the cases in which they were established were not properly decided, having regard to the terms of the Companies Act, 1862; but I cannot help saying that I hope a day may come when it may be gravely considered by the Legislature whether it would not be for the advantage of the community, and especially of the commercial community, that an Act should be passed requiring that in all cases the full nominal amount of a share should be paid in cash, and nothing else. I am satisfied from my own judicial experience with reference to companies that such a law would have a tendency to benefit companies themselves, and to check a large amount of unwholesome speculation on the Stock Exchange, which is largely fed and supported by operations undertaken by vendors, promoters, and others, for the purpose of unloading fully paid shares which they have taken and been allowed to pay for by giving what is called money's worth instead of cash.

STIRLING, L.J.: I also am of opinion that this appeal ought to be allowed, on the short ground that a blot in the scheme which entitles the plaintiff to some relief has been pointed out.

We have before us the form of debenture which is proposed to be issued in pursuance of the scheme, and under the conditions of that debenture any person having paid 80*l.* to the company, and having received in exchange for such payment a debenture for 100*l.*, may forthwith leave at the registered office of the company a notice in writing directing the company to allot and issue to him one hundred fully paid shares of 1*l.* each in the company, and the company upon the surrender of the debenture will be bound to comply with that direction. If the company does so comply, will the shares be validly issued? To my mind, the result obvious on the face of the transaction will be the issue of shares of the nominal value of 100*l.*

in consideration of the payment of 80*l.* only in cash—a transaction which is prohibited by the Legislature ; see *Ooregum Gold-mining Co. of India v. Roper* (1) and *Welton v. Saffery* (5).

It is said that the issue of the debentures is not made with any intention of evading the rule which forbids the issue of shares at a discount, and I am quite willing to believe that no such intention exists. Nevertheless, if in fact the shares are issued at a discount, the honesty or good intentions of the contracting parties will not avail them, as is clearly established by the cases which I have just mentioned. It is further said that, although the result which I have pointed out may be possible, it is most improbable. I do not feel sure of this, for the shares of the company are dealt in on the Stock Exchange, and are of a highly speculative nature, and I cannot tell what steps a speculator in these shares may see fit to take in order to enable him to obtain control of the market ; but I think the possibility of such a transaction taking place is sufficient to entitle the plaintiff shareholders to an injunction of some kind. I desire in support of that view to refer to a passage in Lord Watson's speech in *Ooregum Gold-mining Co. of India v. Roper* (1). [His Lordship read the passage referred to by Mr. Justice BUCKLEY in his judgment, and continued :] Bearing that in mind, and it appearing, as I say, on the face of the documents that we have before us that there is here a possibility of the scheme as it now stands being made use of for the purpose of the issue of shares at a discount, I think that an injunction ought to be granted.

COZENS-HARDY, L.J., read the following judgment : This appeal raises a highly important and very difficult question. Is it competent for a limited company in consideration of 80*l.* to contract to issue a fully paid share of 100*l.* whenever requested so to do ? Put in that bare form, the answer to the question admits of no doubt. The transaction would result in the issue of shares at a discount. It is, however, urged that all objection is removed if the 80*l.* is advanced to the company by way of loan upon the terms that the company shall pay 100*l.* at a future date, with interest in the meantime, and shall give the lender the option at any time to demand a fully paid 100*l.* share in exchange for the 100*l.* debenture. The issue of the debenture at a discount is admittedly lawful, and

it is urged that the result of the issue of the debenture is that the company will be legally indebted in the sum of 100*l.* payable at a future date, and that if and when the debenture-holder gives a notice to the company, such as is contemplated by clause 8 (*b*) of the debenture in the present case, the 100*l.* will become immediately payable by the company, and this debt will be cancelled on the allotment of a fully paid share of 100*l.* The company will thus have received 100*l.*, and the share will not have been issued at a discount.

Now, it is obvious that such a scheme may be used as a means for issuing shares at a discount, the debenture being issued on one day and surrendered on the next day. It would be idle to deny in such circumstances that 80*l.* was the only cash payment for the 100*l.* shares. Nor would it avail the shareholder to assert that he had paid for his share otherwise than in cash by surrendering his debenture for 100*l.*, inasmuch as, to use the language of Lord Justice VAUGHAN WILLIAMS in *Chapman's Case* (3), it would be manifest on the face of the contract that the shareholder was really paying less than the nominal cash value. I do not think we ought to consider the motive or intention of the company in issuing the debentures in this form. The case of the *Ooregum Gold-mining Co. of India v. Roper* (1) disposes of any such idea. I assume in favour of the directors that, from a business point of view, the transaction is expedient, but that is unimportant if the transaction is contrary to the policy of the Act of Parliament. Nor do I think we ought to consider the probability that this option will not be exercised until some distant future date. But if we are to consider it, I regard shares in a mining company of this nature as gambling counters for use on the Stock Exchange, and I can readily imagine that, for the purpose of creating or destroying a "corner," an option of this nature may be of great and immediate value to speculators on the Stock Exchange.

In my opinion, an injunction ought to be granted to restrain the directors from carrying into effect the proposed allotment of debentures pursuant to the scheme in the circular of 25 April on this short and simple ground: that the directors propose thereby to confer an immediate right to demand a 100*l.* share in consideration of a cash payment of 80*l.* only. I desire to guard myself against the supposition that the conclusion at which I have arrived involves

the proposition that under no circumstances can a debenture be issued at a discount which may confer a right at some future date to demand a fully paid share in exchange for the debenture. It is sufficient to say that whenever such a question comes before the Court it will be discussed and decided with the care and deliberation which its importance demands.

Appeal allowed, and injunction granted.

Solicitors: *Cohen & Cohen*, for the Plaintiff.

Ingle, Holmes, Sons & Pott, for the Defendants.



IN RE HOARE & CO., LIMITED.

1904, June 7, 10. C. A. VAUGHAN WILLIAMS, ROMER, AND COZENS-HARDY, L.JJ.

Company—Reduction of Capital—Reserve Fund—Undistributed Profits—Premiums on Leases—Premiums on Issue of Preference Shares—Capital Lost or Unrepresented by Available Assets—Apportionment of Loss between Capital and Reserve—Companies Act, 1867, ss. 9—12—Companies Act, 1877, s. 3.

The provisions of section 3 of the Companies Act, 1877, empowering a company to cancel "any lost capital, or any capital unrepresented by available assets," are alternative provisions; the latter is not explanatory of the former.

A company with a share capital of 1,950,000*l.* had formed a reserve of 292,612*l.* 18*s.* 1*d.*, representing partly premiums received for leases, partly premiums received on the issue of preference shares, and partly undistributed profits. Under the articles the reserve could be applied to meet contingencies, or for equalising dividends, or repairing, improving, and maintaining the property of the company, or for other purposes, as the directors should think conducive to the interests of the company. It might be employed in the business of the company, and it was in fact so employed, and not kept separate. Certain of the company's assets had depreciated by 591,707*l.* 13*s.* 10*d.*, and to that extent capital had been lost or was unrepresented by available assets. It was proposed to reduce the company's capital, writing 396,000*l.* of the loss off by extinguishing a corresponding amount of shares, and to meet 195,707*l.* 13*s.* 10*d.* of the loss by writing that amount off the reserve:—

Held, that the reserve did not represent capital of the company properly so called, and the proper course would be to apportion the loss between the reserve and the share capital; and that the scheme for the reduction of the capital of the company which proposed to attribute more than the rateable proportion of loss to the reserve ought to be sanctioned by the Court.

Per VAUGHAN WILLIAMS, L.J.: If the profit and loss account of a company shows a profit balance, that balance can be distributed as dividend, notwithstanding that the company has at the time lost capital, and the loss can be written off capital entirely without touching upon any fund properly appropriated for dividend, even if the fund has arisen after the loss of capital.

In re Barrow Hematite Steel Co. (1) explained by COZENS-HARDY, L.J.

THIS was a petition for confirmation of a resolution for the reduction of the capital of the company.

The company was incorporated in 1894 as a limited company under the Companies Acts, 1862 to 1890. The object of the

(1) [1900] 2 Ch. 846; 69 L. J. Ch. 869; 83 L. T. 397; on appeal, 9 Manson, 35; [1901] 2 Ch. 746; 71 L. J. Ch. 15; 85 L. T. 493; 50 W. R. 71.

company was to carry on the business of brewers and other kindred businesses.

The original capital of the company was 1,000,000*l.*, divided into 60,000 preference shares of 10*l.* each, 86,000 preferred ordinary shares of 10*l.* each, and 4,000 deferred ordinary shares of 10*l.* each. The preference shares and the preferred ordinary shares were respectively to confer the right to a fixed cumulative dividend at 5 per cent. per annum on the amounts for the time being paid up or credited as paid up thereon, and a successive priority as regards both dividend and capital. Under article 53 of the company's articles of association it was provided that the company might from time to time by special resolution reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets, or reducing the liability on the shares, or otherwise, as might seem expedient.

Under article 119, clause 8, the directors were empowered "before recommending any dividend to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and (subject to clause 4 hereof)"—which forbade the funds of the company being applied in the purchase of or loan upon shares of the company—"to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund or any part thereof in the business of the company, and that without being bound to keep the same separate from the other assets."

In May, 1896, the capital of the company was, under a power in the articles, increased to 1,200,000*l.* by the creation of 20,000 new 5 per cent. preference shares of 10*l.* each. In June, 1897, it was further increased to 1,950,000*l.* by the creation of 75,000 new shares of 10*l.* each, called A cumulative preference shares, to rank next after the 80,000 existing preference shares as regards both dividend and capital.

All the shares forming the capital of the company had been issued, and were fully paid up.

The company had since its incorporation built up a reserve of 292,612*l.* 18*s.* 1*d.*, made up as follows: Premiums received for leases, 48,787*l.* 18*s.* 1*d.*; premiums received on issue of preference shares, 252,000*l.*; general reserve fund, 50,000*l.*, these last two items being subject to a deduction of 58,125*l.* in respect of dividends paid on the preference and A preference shares to 7 October, 1903. The general reserve fund consisted of undistributed profits accumulated since 1896. In addition to the above sums, the company had undistributed 2,865*l.* 17*s.* 8*d.*, part of the profits for the year ending 7 January, 1903, and 29,116*l.* 19*s.* 11*d.*, the profits for the year ending 7 January, 1904. There had been no special resolution for carrying to the reserve the premiums received on the issue of the new preference shares in 1896 and 1897, but the prospectus of the issue in 1897 provided for that to be done in that case; and in the reports and balance-sheets submitted to the shareholders after the issues, and approved by them, the fact of the premiums having been carried to the reserve was stated.

The reserve was used in the company's business, and was not kept separately invested.

The assets of the company consisted to a large extent of tied public-houses and loans advanced on the security of public-houses. The company had recently had a valuation made of its brewery premises, public-houses, and loans, and ascertained that those items were of less value than the amount at which they stood in the company's balance-sheet by the sum of 591,707*l.* 13*s.* 10*d.*, and that capital of the company to that amount had been lost or was unrepresented by available assets. It was proposed to deal with this loss as follows: 396,000*l.* to be written off by extinguishing a corresponding amount of the preferred and deferred ordinary shares, and 195,707*l.* 13*s.* 10*d.* to be met by writing off the like amount, part of the reserve funds of the company.

At extraordinary general meetings of the company held on 25 March and 12 April, 1904, special resolutions were unanimously passed and confirmed for the reduction of the capital of the company to 1,554,000*l.* by cancelling the whole of the preferred ordinary shares and 9*l.* per share of the deferred ordinary shares reducing

them to shares of 11., and altering the articles of association to make them accord with the altered capital. The resolutions were also unanimously approved at separate general meetings of the preference shareholders.

The petition was heard before BUCKLEY, J., on 10 May, 1904.

Neville, K.C., Eve, K.C., and Martelli, for the petition.

BUCKLEY, J.: The case which the petitioning company presents to the Court is this: that the company, which is a very large brewery company, has sustained losses to the extent of 591,707*l.* 18*s.* 10*d.* by depreciation of its brewery premises, public-houses, and loans advanced on the security of public-houses, and it desires to reduce its capital. This it proposes to do by writing off 396,000*l.* of its share capital in a way which I need not discuss—that may be right enough—and also by writing off 195,707*l.* 18*s.* 10*d.* from a reserve fund. The reserve fund amounts to 292,612*l.* 18*s.* 1*d.*, and the company proposes, therefore, to take from the reserve only the sum of 195,707*l.* 18*s.* 10*d.*, leaving 96,905*l.* 4*s.* 3*d.* standing to the credit of the reserve fund after the proposed reduction, which it asks the Court to sanction, has been carried out. I am of opinion that the Court cannot sanction a reduction on those terms.

The reserve fund in question has arisen in this way: Premiums received for leases, 48,737*l.* 18*s.* 1*d.*; premiums received on the issue of preference shares, 252,000*l.*, these together making 300,731*l.* 18*s.* 1*d.*, a figure to which I will revert presently. There is a further general reserve fund, which is stated to be an accumulation of undivided profits, of 50,000*l.* From the aggregate of these sums there has to be deducted a sum of 58,125*l.* in respect of certain dividends which have been paid. The sum of 292,612*l.* 18*s.* 1*d.* is thus arrived at.

Taking first the premiums received for leases and premiums received on the issue of preference shares, 300,731*l.* 18*s.* 1*d.*, I agree that those premiums are profit in a sense; but what is the nature of that profit? It means this: that the company, having certain property, was in a position to dispose of leases on the terms of receiving money for so doing. That was money arising from dealing with property of the same class as that which the company says has

sustained depreciation, as found in the figure of 591,707*l.* 18*s.* 10*d.* loss. It seems to me that that must be written off one against the other. Certain properties have depreciated to the extent of 591,707*l.* 18*s.* 10*d.*, but sums have been received in respect of other properties to the extent of 48,737*l.* 18*s.* 1*d.* The loss made is only the difference between these two amounts.

Then as to the second item—namely, premiums received on the issue of preference shares. The nature of such premiums is, that a company having a prosperous and successful undertaking is able to obtain a sum of money for selling to a person the benefit of membership—the benefit of coming in and subscribing 10*l.* for a 10*l.* share. That is an asset, not of the periodic kind. It is not an income payment in any sense; but, as it seems to me a capital sum, I do not say it can never be divided in dividend—that is a totally different thing—I think it can. But it is a sum which must be brought into account when one is looking to see whether the company has or has not sustained a loss which can be written off in reduction of capital. These two sums together amount to 300,737*l.* 18*s.* 1*d.* But what the company proposes to attribute to this sum is only 195,707*l.* That would leave 105,000*l.* which is not applied, as it seems to me it ought to be applied, in reducing the loss.

Then there is the further sum of 50,000*l.* As to that there is more room for doubt. The sum has been accumulated under article 119, clause 8, which provides the directors shall have power “before recommending any dividend to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving, and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company. . . .” But that, again, I think, is a sum which must be taken into account in ascertaining whether or not the company has sustained loss. It is a sum which is, no doubt, applicable, amongst other things, to equalising dividends; but in considering the writing down of capital I must have regard to the fact that it is equally applicable, in the discretion of the directors, to maintaining the property of the company, and repairing it and improving it, which would go against this depreciation in value of 591,707*l.* 18*s.* 10*d.*

It seems to me, therefore, that the whole of the reserve fund of 292,612*l.* 18*s.* 1*d.*, and not the amount only of 195,707*l.* 18*s.* 10*d.*, must be taken into account in ascertaining the amount of loss which has to be written off.

I have dealt with the case on the principles which seem to me to be applicable to it; but, so far as I am concerned, it might be sufficient for me to say that in the case of *In re Barrow Hæmatite Steel Co.* [1900] (1) Lord Justice (then Mr. Justice) COZENS-HARDY considered an exactly similar point, and came to the conclusion that sums of this kind must be taken into account for the purpose of arriving at the amount of the loss, and, further, that Mr. Justice NORTH in the case of *In re Abstainers' and General Insurance Co.* [1891] (2) applied the same principle, and held that goodwill, being an asset which might produce something if the company were reconstructed, was a thing to be taken into account in ascertaining what was the loss sustained. The case of *In re Barrow Hæmatite Steel Co.* (1) went to the Court of Appeal, but in the view which their Lordships took of the facts it was not necessary for them to review the decision of Mr. Justice COZENS-HARDY. Speaking for myself, I entirely agree with the view which Mr. Justice COZENS-HARDY expressed. Being of that opinion, I think this petition fails, and I must therefore dismiss it.

The company appealed.

Neville, K.C., Eve, K.C., and Martelli, for the appeal :

It was held by COZENS-HARDY, J., in *In re Barrow Hæmatite Steel Co.* (1), that a reserve fund ought to be taken into account in considering whether the capital of the company ought to be reduced, but it has not been before decided that the whole of a reserve must be brought into account. It should be borne in mind that the reserve was originally profit, and it really remains profit; and it is immaterial for this purpose whether the reserve is used in the business or is kept separate. The loss ought strictly to be thrown rateably upon the share capital and the reserve. The question is what is just between the different classes of shareholders: *In re Direct Spanish Telegraph Co.* [1886] (3).

(2) [1891] 2 Ch. 124; 60 L. J. Ch. 510; 64 L. T. 256; 39 W. R. 574.

(3) 34 Ch. D. 307; 56 L. J. Ch. 353; 55 L. T. 804; 35 W. R. 209.

ROMER, L.J.: The only question that we have to consider in this case is one of principle, or it may be called one of law—namely, whether the Court has jurisdiction in such circumstances as arise here to sanction the scheme for the reduction of capital which is before us owing to the loss that has occurred on capital account. I think that we have. There is a reserve fund here properly set apart by the company under the provisions of its articles. That reserve fund was properly created—that is to say, it was a fund which at the time it was created arose from the fact that there were available assets after deducting all liabilities of every kind, including the amount which is represented by the share capital, which might have been applied as the company thought fit without thereby doing any violence to the provisions of the Companies Acts or to the articles of the company; in other words, the surplus which was carried to the reserve fund represented what might have been properly applied at the time, if the company had so thought fit, in paying further dividends to the shareholders, and no person could have complained if that had been done. Under their articles of association the reserve fund could have been applied by the company, if they thought fit, in payment of or in equalising subsequent dividends, or in making good lost capital, or for any purpose they thought proper within the objects of the company.

That was the condition of the reserve fund, and the circumstances under which it was created. What does such a fund as that represent? To my mind, it in no wise represents a capital account properly so called. Let me test it in this way: In this case the company might, if they had thought fit, have taken assets, and set them apart to represent the reserve fund, and might have kept those assets wholly apart from all the other accounts of the company. They might have kept the assets representing the reserve fund strictly to answer that reserve fund, and not have dealt with it in any way as part of the general assets of the company. So long as they did that, it is clear to my mind that the assets representing the reserve fund could not be properly called part of the assets representing the capital account, or capital assets. But in this case the company did what they had power to do, and what is often done in similar cases—namely, they did not set apart special assets to represent the reserve fund, but they allowed the matter to rest in

account, and the assets generally to be dealt with by the company in the ordinary way of business, whether those assets might be said to represent the reserve fund or whether they represented the capital account and the other liabilities of the company. What happened in that state of things was this : After some subsequent trading it was found that there was a great loss of assets, so great that, after taking the liabilities properly so called of the company apart from the reserve fund and the capital account, there was insufficient to meet the reserve fund and the capital liability. In that case what ought to be done with regard to the loss ? Ought it to be attributed wholly to the capital account, or wholly to the reserve fund, or ought it to be treated as apportioned ? In my opinion, under the circumstances of this case the loss ought to be treated as apportioned between the reserve fund and the capital account properly so called—that is, the share capital. In the present case the company propose to do more than that. They propose to attribute a larger proportion of the loss of assets to the reserve fund than they do to the capital account. In my opinion, they are not absolutely bound to do that ; but certainly they have a right to do it, and so far, I think, no complaint can be made of their not wiping out the whole of the reserve fund, but treating a certain part of the assets as representing the reserve fund as written down by them. That leaves a certain amount of assets to represent the share capital after deducting the ordinary liabilities of the company—that is to say, the current debts, and the debenture stock, and so forth ; but when we see what assets there are to meet the share capital, it is clear that there has been a great loss of capital, and accordingly we are asked, under the Acts of Parliament, to sanction a scheme for the reduction of the share capital. In my opinion, the Court has undoubted jurisdiction to deal with a scheme so framed, and to sanction it if it thinks fit.

I quite agree that the Court is not bound in such a case as this to sanction the scheme. I can well understand that there might be cases in which the Court would refuse to sanction any reduction of the capital so long as the company kept anything by way of reserve fund. But the Court undoubtedly, to my mind, has jurisdiction to sanction such a scheme whereby a proper part, as indicated previously by me, of the reserve fund is allowed to exist ; and in the

circumstances of this case I think the Court ought to allow the small proportion of the reserve fund which, according to the scheme, is provided for, to remain as a reserve fund. I think therefore that not only has the Court jurisdiction to sanction the scheme, but that under the circumstances it ought to do so.

I may add that in this case there is no question as to the rights of creditors, and it is a case where all the shareholders are unanimous in approving of the scheme.

VAUGHAN WILLIAMS, L.J.: I am inclined to think that that is right. I asked Lord Justice ROMER to deliver judgment first, because in a matter of this sort I knew that he would put it much more clearly than I could myself; but at the same time I consider it is my duty to state for myself the principle upon which I understand we are acting in the present case.

The particular statute under which we are acting is the Companies Act, 1877, and we have to see, before we can sanction this reduction of capital, whether the case comes within the words of section 3 of that Act, that is to say, whether there is any lost capital, or any capital unrepresented by available assets. I regard those two things as alternatives, and not as if the latter were exegetical.

We have to see whether there is any lost capital, and if so, to what extent. The difficulty which Mr. Justice BUCKLEY had in this case was that he was not satisfied there was lost capital to the extent which was alleged in the petition, and his doubt arose from the existence of this reserve. I do not use the words "reserve fund," because it is not true in fact to say that there was any reserve fund at all. If there had been any reserve fund in this case, and if the reserve fund was a fund which appropriated a sum which might have been paid in dividends, but which the company did not think it prudent to distribute in dividends at the moment, but retained in hand ready to distribute in dividends if they thought fit, I should have said that under such circumstances, if there were a loss such as that in this case by the reduction in market value of the tied houses, the whole of that loss would be a loss which for the purpose of this statute as to reduction of capital ought to be written off capital, properly so called, entirely.

We really have not to decide that in this case, because the facts do not raise such a case; but I do want to say, before leaving that point, that as I understand it, however much capital has been lost at any given date, if the profit and loss account of the company shows a profit balance, then to the extent of that profit balance the company are entitled to distribute that money as dividend, notwithstanding the fact that they have lost capital which they have not replaced. Under these circumstances, so far as this undistributed money is to be considered, I think that even if it had arisen after the loss of capital, and the company could have appropriated it to the payment of dividend when it would be right to do so, the whole of the loss could then be properly written off capital. I expected that a resolution would have been produced showing that there had been some such appropriation; but that is not the case. No fund has really been created and invested which might have been distributed as dividends. What has been done is exactly the same as if the balance of profit and loss—that is to say, the profit balance—had existed in sovereigns, and the directors had met together and had said, “We have such a sum that we could distribute if we chose now in dividends, but we think it wiser not to do so at present, and therefore we will carry this sum to a reserve.” That is, to my mind, precisely the same as if they had said, “We will pour these sovereigns into the till.” Then, when those sovereigns are in the till, it is not, to my mind, a true way of looking at them to say, “Here is a fund consisting partly of these sovereigns and partly of the other items appearing upon the asset side of the balance-sheet, and we will treat the capital and the reserve as being two funds which are charged upon one security, that one security being the total of the assets, including therein all the asset side of the balance-sheet and the money which has been poured into the till.” I do not think it would be right to regard the capital and that reserve fund as two funds charged upon one security. If it were so, and there was a loss, one could get at the rateable proportion of the loss without any difficulty at all.

If one cannot do that what is the proper way of doing it? I suppose one has to say that although the sum undistributed has not been segregated from the circulating capital, but has been poured into the till, nevertheless the power of the directors to do

with this money as they may think best in the interests of the company has not yet gone. Suppose, for instance, that there had been no scheme for reduction at all, could the company have distributed this sum as a dividend? Theoretically I think they could. But I think they ought not to have done so. Our conclusion in the present case is that what ought to be done by commercial men managing a commercial undertaking is to distribute the loss in proportion to the figures of the share capital and the reserve fund. Although that has not been done in this scheme, the departure has only been in the sense of attributing too large a proportion of loss to the reserve fund and too small a proportion of loss to the share capital. Under those circumstances, there having been an undoubted loss of capital in this case, and as we think that loss has been properly allocated as a commercial matter between the share capital and the reserve fund, we may sanction the scheme.

COZENS-HARDY, L.J. : I agree, but I wish to add a few words of my own. I think the leading idea of Mr. Justice BUCKLEY's judgment was that you cannot reduce capital unless you find that the capital has been lost, and is not represented by any fund, whether it is in the nature of capital or income. I cannot read the Act in that sense. I think, if you prove that capital has been lost, you do not really want to consider whether it is unrepresented by available assets; but, although capital may not be lost, it may still be unrepresented by available assets, and in that case there is power to reduce.

We have here to deal with a large loss—that is to say, the assets are not sufficient to meet the liabilities which represent the share capital and the reserve fund. How ought that to be dealt with? I adopt the view of Lord Justice ROMER on that point. I think that if the assets ought to represent both the share capital and the reserve fund, and are not sufficient to do so, the proper course is to attribute the loss rateably between them, or, in other words, that we should not be justified in saying that a larger amount of capital has been lost than would be the result of working out the proportion in that manner. No doubt the whole of this reserve fund might have been applied to make good this loss of capital. The directors propose to take from it more than its proportionate share,

but to leave what I may call a moderate reserve fund. That being so, it seems to me that we are entitled to say that it has been established in the present case that capital has been lost, and lost to the extent it is proposed to be written off by this scheme.

I desire to say one word about the case of *In re Barrow Haematite Steel Co.* (1), a decision of my own to which Mr. Justice BUCKLEY referred. In that case the reserve fund was blended with the other assets, but had not been taken into account at all. I do not think that I meant to say more than that, in considering the loss of capital, one ought to have regard to the fact that the assets included a reserve fund not separately invested. If my language goes further than that, I certainly desire to qualify it in the sense I have now mentioned.

Appeal allowed; words "and reduced" after name of company dispensed with.

Solicitors: *Sandilands & Co.*

IN RE PRETORIA PIETERSBURG RAILWAY CO.

1904, June 16, 20. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

Company—Winding-up—Appeal—Order made by Registrar—Practice—Application to Judge.

When a matter in the winding-up of a company has been heard by the Registrar, and he has made an order either granting or refusing the application, the proper course for those who wish to reverse his decision is to move before the Judge, and not to appeal direct to the Court of Appeal.

THIS was an appeal from a decision of Mr. Registrar Hood.

A summons was taken out in the winding-up of the above company by Jan Volker asking for an order that he was entitled to prove as a creditor of the company for 120*l.* The liquidators of the company, the respondents to the summons, applied to the Registrar that the applicant, who was resident out of the jurisdiction of the Court, in Holland, might be ordered to give security for costs.

The Registrar on 12 May refused the application. The liquidators appealed.

Younger, K.C., and Bischoff, for the liquidators.

Corbet, for the applicant on the summons :

There is a preliminary objection. The appeal ought not to be made direct to this Court, but an application ought in the first instance to be made to the Judge.

Younger, K.C., and Bischoff :

In Chancery the Master's order is technically the order of the Judge, and the Master cannot refuse to adjourn a matter to the Judge if the parties wish it, and the Court has power to vary its orders from time to time ; but in some cases this Court will hear an appeal direct from Chambers : *Engel v. South Metropolitan Brewing and Bottling Co.* [1892] (1) and *Strong v. Carlyle Press* [1892] (2). In *In re Strand Wood Co.* [1904] (3), an appeal was heard direct from the Registrar, but the objection to it was not pressed. It is understood that an application was made to BUCKLEY, J., in that case to discharge the Registrar's order, but he declined to deal with it, and said it was for the Court of Appeal.

The Registrar's functions are now regulated by rule 7 of the Companies (Winding-up) Rules, 1908, which is to the same effect as rule 1 of the Companies (Winding-up) Rules, 1892, now repealed. The Registrar may, under the general or special directions of the Judge, hear and determine any application or matter which under the Acts and rules may be heard and determined in Chambers. Under sub-rule 2 any matter before him may at any time be adjourned by him to the Judge, but that only applies to matters which he has not determined. The Registrar, therefore, has power to exercise the jurisdiction of the Court in matters in Chambers, and his order must be treated as the order of the Court. No application can be made to him to discharge his order, as he never sits in Court, and it is understood that the Judge declines to hear such applications. The Registrar has given leave to appeal, and under those circumstances an appeal will lie to this Court under section 50 of the Judicature Act, 1873. Unless that section

(1) [1892] 1 Ch. 442 ; 61 L. J. Ch. 369 ; 66 L. T. 155 ; 40 W. R. 282.

(2) [1893] 1 Ch. 268 ; 62 L. J. Ch. 541 ; 68 L. T. 396 ; 41 W. R. 404 ; 2 R. 283.

(3) *Ante*, p. 291.

applies, there seems to be no appeal under the circumstances from the Registrar.

VAUGHAN WILLIAMS, L.J. : We will speak to Mr. Justice BUCKLEY about the matter. It would be better that we should do that before making any modification in the practice.

June 20.

VAUGHAN WILLIAMS, L.J. : We have seen Mr. Justice BUCKLEY as to this matter, and we are of opinion that the proper course when a matter has been before the Registrar, and he has made an order whether granting the application or refusing it, for those who wish to reverse his decision is to move before the Judge. We think that we ought not to hear an appeal direct from the Registrar. These matters are interlocutory matters which are to be disposed of by the Registrar in Chambers.

Mr. Justice BUCKLEY will, I understand, entertain applications of this kind. I think there has been some misapprehension as to his refusing to deal with them. The application must be made to Mr. Justice BUCKLEY. We make no order except that the costs of the appeal are to be dealt with by Mr. Justice BUCKLEY.

ROMER, L.J., and COZENS-HARDY, L.J., concurred.

Solicitors : *Bompas, Bischoff, Dodgson, Cox & Bompas*, for the Appellants.

Cayley & Cayley, for the Respondent.

SHEFFIELD CORPORATION v. BARCLAY & CO.

1903, July 28, 29, 30 ; August 11. C. A. VAUGHAN WILLIAMS,
ROMER, AND STIRLING, L.JJ.

Company—Transfer of Corporation Stock—Forged Deed of Transfer—Innocent Transferee—Registration—Implied Indemnity—Warranty of Title—Sheffield Corporation Act, 1883, ss. 27, 29, 30, and 32.

A corporation or company which has put upon it by Act of Parliament the duty of keeping the register of the holders of stock issued by it, and of issuing certificates to the stockholders, does not, when registering a transfer of stock sent in to it, act voluntarily on the request of the transferee, but acts in the performance of a statutory duty. When receiving a transfer it has a duty as between itself and the transferor to see that the transfer was really the act of the transferor. It cannot assume as against the transferee in the ordinary course that he had personally the means of seeing to the actual execution of the transfer by the transferor. It can only assume that the transferee has taken reasonable care in the matter, and had ground for believing, and did believe, that the transfer which purported to be executed by the transferor had in fact been issued by him. And no warranty of the execution of the transferor can be implied against the transferee, nor can any contract be implied against him to indemnify the company or corporation if it should turn out that the transfer had not in fact been executed by the transferor.

Decision of Lord ALVERSTONE, C.J. (1), reversed.

THIS was an appeal from a decision of Lord ALVERSTONE, C.J.

The facts were shortly as follows: Prior to April, 1898, a sum of 8,200*l.* 8½ per cent. 1883 stock of the plaintiff corporation stood in the names of Timbrell and Honnywill, and a certificate for the same was made out in their names and issued by the corporation. This stock was, on the instructions of Timbrell, sold on the Stock Exchange. The purchasers applied to the stockbrokers for an advance to enable them to complete the purchase. The brokers agreed to procure the money upon the security of the stock, and a deed of transfer of the stock, dated 11 April, purporting to be executed by Timbrell and Honnywill was handed to them. They obtained the necessary advance from the defendants, and on 14 April they handed the deed of transfer to the defendants, E. E. Barclay, one of the firm, being the transferee named in the deed. Honnywill's signature to this transfer was a forgery.

The sections of the Sheffield Corporation Act, 1883 (46 & 47

Vict. c. lvii.), regulating the transfer of stock of the plaintiff corporation, are referred to in the judgment of VAUGHAN WILLIAMS, L.J.

On 15 April, 1898, the defendants, Messrs. Barclay & Co., sent the transfer of the 11th to the corporation, enclosed in a letter in the following terms: "54, Lombard Street, London, E.C., April 15, 1898. Messrs. Barclay, Bevan, Ransom & Co. present their compliments to the Registrar of the Sheffield Corporation, and beg to send enclosed the transfer of 8,200*l.* 9½ per cent. 1888 stock, and will be obliged by his registering the same in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course. Messrs. Barclay & Co. also enclose the amount of the registration fee. The Registrar, Sheffield." This was followed by a letter of the 17th from Sarkas, the Registrar, acknowledging the receipt, but pointing out that the registration fee had not been sent; and on 18 April Messrs. Barclay & Co. sent the registration fee. The plaintiffs wrote to Timbrell and Honnywill telling them that the transfer had come in, and receiving no reply, they registered E. E. Barclay as the holder of the stock. On 28 April, 1898, E. E. Barclay, the transferee named in the forged transfer of 11 April, executed a transfer of 8,000*l.* of the stock to Messrs. Young and Macdonald, and upon 12 May of the balance, 200*l.*, to Mary Florence Cockayne. Upon 1 June the plaintiffs issued certificates to Young and Macdonald for the 8,000*l.* and to Mary Cockayne for the 200*l.*

In the year 1901 an action was brought by Honnywill against the corporation, claiming the rectification of the register by inserting his name as the holder of the 8,200*l.* stock transferred to Barclay under the forged transfer, and the interest and dividends paid thereon. In that action the jury found that the transfer was a forgery and had not been executed by Honnywill or with his authority, and for the purpose of this action it was agreed that the defendants were bound by that finding.

The corporation then purchased stock to replace that which had been transferred out of the name of Honnywill. They brought this action to recover from the defendants the loss incurred by them in this respect, founding their claim on the implied promise by the defendants to indemnify them for loss directly occasioned through their transferring the stock at the request of the defendants, and

also on an implied warranty by the defendants that the transfer deed was a valid document.

Lord ALVERSTONE, C.J., gave judgment for the plaintiffs, being of opinion that they were entitled to an indemnity from the defendants.

The defendants appealed.

Haldane, K.C., and F. R. Y. Radcliffe, for the appellants:

The question depends on the true inference to be drawn from the facts whether from all the circumstances a jury would imply a contract to indemnify. The authorities show that the implied agreement to indemnify only arises where the defendant directs the act: *Betts v. Gibbins* [1884] (2), *Adamson v. Jarvis* [1827] (3), *Toplis v. Grane* [1839] (4), *Humphrys v. Pratt* [1831] (5), *Dugdale v. Lovering* [1875] (6), *Childers v. Wooler* [1860] (7), *Collins v. Evans* [1844] (8), and *Smith v. Keal* [1882] (9). The corporation is not in any relation of agency as keeper of the register. In registering transfers it is rather in the position of a person who has a public duty to perform, than of a person acting on the demand of a principal. Any estoppel that arises against it by certificate of registration arises in that way, and companies and corporations do as a fact make inquiries as to the genuineness of a signature before registering a transfer: *Simm v. Anglo-American Telegraph Co.* and *Anglo-American Telegraph Co. v. Spurling* [1879] (10).

[STIRLING, L.J., referred to *Cottam v. Eastern Counties Railway* [1860] (11).]

(2) 2 Ad. & E. 57; 4 N. & M. 64; 4 L. J. K. B. 1.

(3) 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. (o.s.) C. P. 68; 29 R. R. 503.

(4) 5 Bing. (n.c.) 636; 7 Scott, 620; 2 Arn. 110; 9 L. J. C. P. 180.

(5) 5 Bligh, (n.s.) 154; 2 Dow. & Cl. 288.

(6) L. R. 10 C. P. 196; 44 L. J. C. P. 197; 32 L. T. 155; 23 W. R. 391.

(7) 2 E. & E. 287; 29 L. J. Q. B. 129; 2 L. T. 49; 8 W. R. 321; 6 Jur. (n.s.) 444.

(8) 5 Q. B. 820; 1 Dav. & M. 72; 13 L. J. Q. B. 180; 8 Jur. 345.

(9) 9 Q. B. D. 340; 51 L. J. Q. B. 487; 47 L. T. 143; 31 W. R. 67.

(10) 5 Q. B. D. 188; 49 L. J. Q. B. 392; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280.

(11) 1 J. & H. 243; 30 L. J. Ch. 217; 3 L. T. 465; 9 W. R. 49; 6 Jur. (n.s.) 1367.

That was followed in *Johnston v. Renton* [1870] (12).

If it be true that a man who brings a transfer to a company or corporation can rely on an estoppel arising from the certificate: *In re Bahia and San Francisco Railway* [1868] (13), *Balkis Consolidated v. Tomkinson* [1893] (14), and *Dixon v. Kennaway* [1900] (15), it cannot be that the company or corporation is entitled to any indemnity from him. The intending transferee simply asks it to perform an official act, and no contract of indemnity could arise under these circumstances: *Carshore v. North-Eastern Railway* [1885] (16) and *Birmingham and District Land Co. v. London and North-Western Railway* [1886] (17).

Danckwerts, K.C., Bankes, K.C., and Waddy, for the plaintiff corporation:

If a man asserts a thing as to which he is ignorant whether it is true or not, he renders himself liable: *Derry v. Peek* [1889] (18), and it is no answer to say that the person to whom the assertion is made might have known the true state of the facts if he had made inquiry: *Redgrave v. Hurd* [1881] (19) and *Central Railway of Venezuela v. Kisch* [1867] (20). *Starkey v. Bank of England* [1903] (21) supports this contention.

The case is analogous to that of a sheriff acting on the representation of a person. In that sense he is the mandatory of the other. If A. comes to B. and states as a fact that which would make it B.'s duty to do a particular act, there is an implied agreement on the part of A. to indemnify B. against the consequences of that act: *Betts v. Gibbins* (2), *Toplis v. Grane* (4), *Childers v. Wooler* (7),

(12) L. R. 9 Eq. 181; 39 L. J. Ch. 390; 22 L. T. 90; 18 W. R. 284.

(13) L. R. 3 Q. B. 584; 9 B. & S. 844; 37 L. J. Q. B. 176; 18 L. T. 467; 16 W. R. 862.

(14) [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 42 W. R. 204; 1 R. 178.

(15) 7 Manson, 446; [1900] 1 Ch. 833; 69 L. J. Ch. 501; 82 L. T. 527.

(16) 29 Ch. D. 344; 54 L. J. Ch. 760; 52 L. T. 232; 33 W. R. 420.

(17) 34 Ch. D. 261; 56 L. J. Ch. 956; 55 L. T. 699; 35 W. R. 173.

(18) 14 App. Cas. 337, 351; 58 L. J. Ch. 864, 874; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148.

(19) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 485; 30 W. R. 251.

(20) L. R. 2 H. L. 99; 36 L. J. Ch. 849; 16 L. T. 500; 15 W. R. 821.

(21) [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 8 Com. Cas. 142.

Dugdale v. Lovering (6), *Smith v. Keal* (9), *Birmingham and District Land Co. v. London and North-Western Railway* (17).

There was no duty on the corporations to make any inquiries or to compare the signatures. No case establishes that, and no such duty was thrown upon them by their Act. The Act makes a code for the corporation as regards their borrowings, and prescribes what is to be done on transfers of their stock, and they are confined to that. The sections of the Companies Act, 1862, which are said to show by implication their duty as regards keeping the register, are sections 22 to 26 and 30 to 35, but there is no section which corresponds exactly with section 29 of this private Act.

The only way in which the cases on estoppel are of assistance is with respect to the duty of the corporation in keeping the register. Estoppel is only a rule of evidence: *Low v. Bouverie* (22). The cases do not come to more than this: that by the certificate the company is estopped from denying the right of the person to whom it is issued to be on the register: *Simm v. Anglo-American Telegraph Co.* (10), *Hart v. Frontino, &c., Gold-mining Co.* [1870] (23), *Balkis Consolidated v. Tomkinson* (14), and *Dixon v. Kennaway* (15). They are of no assistance on the question of indemnity.

The letter of 15 April, 1893, accompanied by the transfer and certificate, amounted to a representation on the part of the defendants which makes them liable: *Richardson v. Williamson* [1871] (24), *Firbank v. Humphreys* [1886] (25), *Starkey v. Bank of England* (21), *Boston and Albany Railroad Co. v. Richardson* [1883] (26), *Chatham Furnace Co. v. Moffatt* [1888] (27), *Simm v. Anglo-American Telegraph Co.* (10), and *Cocks v. Masterman* [1829] (28).

F. R. Y. Radcliffe, in reply:

The cases last cited go upon the principle of breach of warranty of authority, like *Collen v. Wright* [1857] (29). If it is put on that ground, the claim is barred under the Statute of Limitations:

(22) [1891] 3 Ch. 82; 60 L. J. Ch. 594, 601; 65 L. T. 533; 40 W. R. 50.

(23) L. R. 5 Ex. 111; 39 L. J. Ex. 93; 22 L. T. 30.

(24) L. R. 6 Q. B. 276; 40 L. J. Q. B. 145.

(25) 18 Q. B. D. 54; 56 L. J. Q. B. 57; 56 L. T. 36; 35 W. R. 92.

(26) 135 Mass. 437 (Amer.).

(27) 147 Mass. 403 (Amer.).

(28) 4 Man. & Ry. 676; 9 B. & C. 902; 8 L. J. (o.s.) K. B. 77.

(29) 8 E. & B. 647; 27 L. J. Q. B. 215; 6 W. R. 123; 4 Jur. (n.s.) 357.

Gibbs v. Guild [1881] (30). When a man puts forward a transfer for registration he does not assert the genuineness of the document as regards the transferor. He has no means of knowing that.

The American cases cited are not authorities here. They go upon the principle of an innocent misrepresentation being actionable. The American cases are collected in Pollock on Torts (6th ed.), p. 282.

[VAUGHAN WILLIAMS, L.J., referred to *Merry v. Nickalls* [1872, 1875] (31).]

Cur. adv. vult.

August 11.

VAUGHAN WILLIAMS, L.J., read the following judgment: This is an appeal from the judgment of Lord ALVERSTONE, C.J., in an action tried by him without a jury. The facts will be found sufficiently set forth in the judgment of the Lord Chief Justice. Shortly, they seem to me to come to this: One Honnywill was the owner of 8,200*l.* stock of the Sheffield Corporation redeemable stock. This stock was created under the Sheffield Corporation Act, 1883, and the duties of the corporation in respect of the transfer of stock are controlled by sections 27 to 32 of that Act. This stock, by means of a forged transfer, purported to be transferred to Barclay, the defendant. The defendants, the firm of Barclay & Co., on 15 April, 1893, sent to the plaintiffs a forged transfer with a covering letter in the following terms. [His Lordship read the letter, and continued:] This letter did not enclose the certificate of Timbrell and Honnywill, who purported to be the vendors and to have executed the transfer to Barclay. The Sheffield Corporation, however, had in their possession this certificate, having received it on account of the vendors from their brokers. The signature of Honnywill was a forgery; and in the year 1901 Honnywill brought an action against the corporation claiming the rectification of the register by inserting his name as the holder of the 8,200*l.* stock transferred to Barclay under the forged transfer and the interest and dividends paid thereon. The jury found that the transfer was a forgery; and for the purposes of this action it was agreed that the defendants

(30) 8 Q. B. D. 296; 51 L. J. Q. B. 228; 46 L. T. 135; 30 W. R. 407; affirmed on appeal, 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; 30 W. R. 591.

(31) L. R. 7 Ch. 733; 41 L. J. Ch. 767; 27 L. T. 12; 20 W. R. 929; L. R. 7 H. L. 530; 45 L. J. Ch. 575; 32 L. T. 623; 23 W. R. 663.

were bound by that finding. The Sheffield Corporation thereupon, in compliance with the judgment in that case, purchased stock for the sum of 8,645*l.* 10*s.*, and have appropriated the same to Honnywill, and have further paid to him a sum for dividends and interest and also his taxed costs of the said action. The Sheffield Corporation, in the present action, claim that the defendants are liable to repay them the moneys so paid as aforesaid and to indemnify the plaintiff corporation in respect of the said liabilities. The plaintiffs shape their case in this way: They say that the plaintiffs have done a lawful act at the request of the defendants, which lawful act had caused the plaintiffs damage, and that, therefore, the defendants were liable for the damage so caused to the plaintiffs. They also say that the question whether a contract of indemnity ought to be implied is in each case a question of fact; and that the implication ought to be made in this case by reason of the defendants having sent in to the plaintiffs the forged transfer at the time when they requested or, to use the word of the special Act, demanded registration and a certificate.

Before dealing more particularly with the terms of the Sheffield Act and the authorities bearing on the circumstances justifying an implication of a contract of indemnity, I wish to say at once that I regard what the defendants did and the act of the corporation thereupon as being aptly described by the words of Baron BRAMWELL in *Hart v. Frontino, &c. Gold-Mining Co.* (23): "I made you a tender of myself as shareholder, and you accepted me, and I have acted upon that acceptance." And I do not think that the defendants in sending in a transfer to the corporation gave any warranty to the corporation, or made any material representation to the corporation, that the transferor was the registered holder of the stock. (See the judgment of Lord FIELD in *Balkis Consolidated v. Tomkinson* (14), where he says a purchaser sending in the transfer to the corporation makes no representation which might estop them as against the corporation. See also an observation of Lord Justice BRETT to the same effect in *Simm v. Anglo-American Telegraph Co.* (10).)

I will now deal with the authorities. It seems to me perfectly clear that a distinction must be drawn between cases where a request is made to some one who has no duty in the matter independently of the request, and a case where the request is made

to one who has a duty in the matter independently of the request. In the former case, where that which is requested to be done does not appear to be illegal, and an act is done in accordance with the request, the implication of a contract of indemnity by the person making the request will generally be made. In the latter case something more than a mere request will be required to raise the contract of indemnity. This distinction is apparent by a comparison of the cases where an indemnity is claimed by those who have no duty in the matter with cases of indemnity claimed by sheriffs. The fact is that in the former class of cases the request or instruction is the sole cause of the act. In the latter the performance of the duty is, or may be, the dominant cause. *Collins v. Evans* (8) is a case in the Exchequer Chamber, in which the defendants, having reason to believe and actually believing a fact to be true and representing it as such to the sheriffs, who had a duty in the matter, were held not to be liable to an action, although it turned out in the event that they were mistaken; and Chief Justice TINDAL distinguished that case from the case of *Humphrys v. Pratt* (5) on the ground that in that case the plaintiff pointed out the goods and required the sheriff to take them. *Childers v. Wooler* (7) is a case on the same lines, in which the defendant Wooler, as attorney for the plaintiff in a suit, caused a writ of *fi. fa.* to be issued upon the judgment, and the usual endorsement of the amount to be levied was followed continuously by these words: "The defendant is a" (here there was a blank), "and resides at Redcar, in your bailiwick"; and the Court of Exchequer Chamber held that the endorsement was nothing more than a mere statement by the attorney for the purpose of affording information to the sheriff, leaving the sheriff to his own discretion as to how he would act. On the other line of cases one finds as examples *Toplis v. Grane* (4), in which the defendant authorised the plaintiffs as brokers to distrain, and the plaintiffs, after asking for an indemnity, proceeded to distrain and took some privileged goods in *bonâ fide* compliance with the defendant's direction, without, however, having obtained an indemnity, and the defendant was held liable. And, again, in *Betts v. Gibbins* (2), goods were deposited with the plaintiffs for N., who took two casks away, and the defendant ordered the plaintiffs not to deliver the residue of the goods, which order the plaintiffs

obeyed. The plaintiffs being sued and having to pay the sum of money and costs to compromise the action, it was held in an action by the plaintiffs against the defendant that a promise to indemnify to the full amount claimed might be implied from the facts. These were cases in which there was no relation of principal and agent, and the mere request or instruction by the defendant to the plaintiffs to withhold the goods from N., obeyed by the plaintiffs, was held to be sufficient evidence to raise a contract of indemnity. Where the relation of principal and agent exists it is *à fortiori* that a contract of indemnity may arise on the fact. These cases illustrate the distinction which I have drawn.

I will now deal with the special provisions of the Sheffield Act, although I do not think that they differ materially from the provisions to be found in the Companies Act, 1862. The most material provisions seem to me to be section 25 (1) which requires the corporation to keep books in which shall be entered the names and addresses of the holders from time to time of corporation stock; and (2) that the corporation stock registered shall be *prima facie* evidence of the title of the persons entered therein as holders of stock. Section 26 (1) which provides that on demand of the holder of corporation stock, the corporation may, if they think fit, give him a certificate of proprietorship thereof: (2) that a stock certificate shall be *prima facie* evidence of the title of the person therein named. Section 29 (1) that where stock is transferable by deed (which is this case); (4) the deed of transfer when duly executed shall be delivered to and kept by the corporation or the registrar, and the corporation or the registrar shall enter a memorial thereof in the register of transfers: (5) the corporation or the registrar shall on demand and on delivery up of the old stock certificate, or on proof satisfactory to the corporation of its absence, deliver a new stock certificate to the purchaser; (6) until the deed of transfer has been so delivered the corporation shall not be affected thereby, and the purchaser of stock shall not be entitled to receive any dividend thereon. Section 30 (1) the corporation or the registrar, before allowing any transfer of stock, may, if the circumstances of the case appear to make it expedient, require evidence of the title of any person claiming a right to make the transfer.

It seems to me that in this case those who sent the old certificate

to the corporation—that is to say, those who claimed to be vendors—claimed a right to make the transfer, and in my judgment all that Barclays did was to tender the transfer for acceptance, and the corporation accepted the transfer. The case, as pointed out by Baron BRAMWELL in *Hart v. Frontino, &c. Gold-Mining Co.* (23), is analogous to the case of a *bonâ fide* holder of a bill of exchange presenting it for payment to a banker: if the banker pays it he cannot afterwards recover the money from the holder on the ground that the name of the drawer was forged. Mr. Justice LINDLEY took the same view in *Simm v. Anglo-American Telegraph Co.* (10). In my judgment the provisions of the special Act bring this case within the observations of Mr. Justice BLACKBURN in the case of *In re Bahia and San Francisco Railway* (13), approved by Lord HERSCHELL in *Balkis Consolidated v. Tomkinson* (14). Those observations are to this effect: That when joint stock companies were established it was a great object that the shares should be capable of being easily transferred; that the Legislature had accordingly provided for the keeping of a register of the members, in order to keep which the company must alter the register whenever there was a transfer of its shares; and the learned Judge drew attention to section 31 of the Companies Act, 1862, which provides that a company may give certificates, and that these shall be *primâ facie* evidence of the title of the person named to the shares specified, and pointed out that by granting the certificate the company make a statement that they have transferred the shares specified to the person named in it and that he is the holder of the shares; that if the company have been deceived, and the statement is not true, they may not be guilty of negligence, but they, and no one else, had power to inquire into the matter. The learned Judge expressed the opinion that it was the intention of the Legislature that these certificates should be documents on which buyers might safely act, and continued thus: “it is quite clear that a statement of a fact was made by the company on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having *bonâ fide* acted upon that statement and suffered damage, can they recover from the company? I think they can on the principle enunciated in *Freeman v. Cooke* [1848] (32).” And Lord HERSCHELL in *Balkis*

Consolidated v. Tomkinson (14) points out that it makes no difference whether it is the purchasers who are seeking to render the company liable by way of estoppel, or the vendor of the shares who himself received the certificate from the company, because it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the face of it enter into a contract to sell the shares. It seems to me to be the fact in the present case.

I have only now to deal with the case directly bearing on the position and rights relatively of the person who tenders a transfer for acceptance and the company who accept it. It was not really contested in argument before us that the corporation had some duties towards the person tendering the transfer. It was admitted that it was their duty to look at their register; and it was admitted that, in some cases at all events, the character of the duty was such that the issue of the certificate might raise an estoppel against the corporation if they neglected that duty. Indeed, the House of Lords in the case of *Balkis Consolidated v. Tomkinson* (14) affirmed the judgment in favour of the plaintiffs on the basis of the estoppel arising on the issue of the certificate; and it seems to me that in the main the opinions of the law Lords were rather in favour of than contrary to the opinion of Baron BRAMWELL in *Hart v. Frontino, &c. Gold-Mining Co.* (23), and Mr. Justice LINDLEY in *Simm v. Anglo-American Telegraph Co.* (10). It is true that Lord MACNAGHTEN in his judgment says: "Whether under such circumstances a person ought to be permitted to rely upon a misrepresentation innocently made to which he has in a sense and to a certain extent contributed is, I think, a matter not unworthy of consideration. The point, however, was not argued; the evidence bearing upon it was not sifted, and the attention of the learned counsel for the respondents was not called to it. It would not, therefore, be right for me to say more than that in my opinion there is nothing to prejudice the question if it should ever be raised, even under circumstances similar to those which have occurred in the present case. With this reservation, I concur in the motion that has been proposed." But this doubt as to the estoppel seems to me rather to negative than to affirm that in such a case there would be evidence upon which to raise an implied contract of indemnity. Then, again, as to the judgment

of Lord FIELD, after affirming in general terms the view of Lord HERSCHELL, and agreeing in the view that a transferor who has entered into a contract to deliver valid shares upon the face of a certificate of his ownership issued to him by the company is in the same position as a purchaser, he goes on to say: "I can, however, well understand that there may be cases in which the untruth of the statement not depending upon any fact within the knowledge of the company, as to which they have means of knowledge, which they reasonably ought to have recourse to, and the person setting up the estoppel having equal means of knowledge, and having applied and obtained the certificate upon an alleged transfer—I say there might be such cases in which no such estoppel may exist." And he goes on to say that such a state of things existed in *Simm v. Anglo-American Telegraph Co.* (10), and to agree with the Court of Appeal in that case that there is no duty upon that company to inquire of a registered holder whether the signature was genuine, although it was the practice to do so. This passage raises a doubt as to estoppel in other cases; but the next passage seems to me distinctly to negative the raising of any contract of indemnity against the person presenting the transfer, in case it turns out in fact not to have been executed by the person purporting to be the transferor, for he says, "In sending in a transfer to a company for registration it does not appear to me that the applicants give any warranty, or even make a material representation to the company that the transferor is the registered holder of the shares." But in the same judgment he says that it is at least the duty of a company, before affixing the seal of the company to a representation which they know that the applicant requires as evidence of title upon which he may go into the market, and make contracts of sale, according to the regulations of the Stock Exchange, and involving the duty of making a complete delivery of genuine shares, to ascertain by reference to their own register whether the proposed transferor appears to be the holder of the shares which he purports to transfer or is the registered holder of the shares. How can it be said, in a case in which the corporation had a statutory duty to accept or reject the transfer, a contract of indemnity is raised against the person who, in presenting the transfer, gave no warranty and made no material representation? So to hold, in my

judgment, would be inconsistent with business and would materially impede that traffic in shares and stocks which is essential to the very existence of joint stock companies and to the floating of loans to municipal corporations.

In my judgment, the judgment of the Lord Chief Justice was wrong, and ought to be reversed.

ROMER, L.J., read the following judgment: I have come to the same conclusion. After the judgment of the Lord Justice I will only say a few words. In the first place, it is important to remember that the sole question before us is whether a contract of indemnity can be implied. I say this because it may well be that the transaction between the parties gave rise to some rights on the part of the corporation against the defendants. For instance, if the corporation had been fortunate enough to discover the forgery in good time, and before the defendants had in any substantial way altered their position on the faith of the certificate issued to them, it would have been entitled to bring an action against the defendants to recover the certificate, and to establish the right of the corporation to remove the name of the defendant E. E. Barclay from the register of stockholders in respect of the stock in question. But can a contract of indemnity be implied? Now that kind of contract is a very onerous one on the part of the person who has to indemnify, and is one not lightly to be implied. And in the circumstances of this case it appears to me that it ought not to be implied. This is not the case where a person, having no independent duty or obligation to do a particular act, does that act at the request and for the purposes of another. In such a case, if the act is one not known by him at the time to be illegal, but is one that turns out to be wrongful, the person doing the act may make the person requesting it indemnify him under an implied contract. But in the present case it was in the interests of the corporation itself to keep the register of stockholders and issue certificates, and the corporation was bound to keep the register correctly. The defendants were obliged to send in the transfer to E. E. Barclay, and to get the transferee registered by the corporation, assuming (as the facts were) that they believed the transfer to be genuine, and desired, accordingly, to be duly recognised as holders of the

stock. The corporation did not act voluntarily on the request for registration made by the defendants. It acted because of the duty cast upon it, and (partly, at any rate) for its own purposes. When it received the transfer it had a duty or obligation cast upon it, as between itself and the transferor, to see that the transfer was really the act of the transferor. Accordingly the corporation took such steps as seemed to it sufficient to satisfy itself that the transfer was genuine. It compared the signatures of the transferors in its possession with the signatures to the transfer, and sent notice to the transferors that it was going to act on the transfer if no objection was taken by them. In fact, the corporation judged and acted for itself in dealing with the transfer, and did not act merely on the request of the defendants. Nor is this a case where, as between these parties in favour of the corporation, the authenticity of the signature of the transferors is to be taken to be a matter exclusively in the knowledge of the defendants. As a matter of business it cannot be that the corporation was entitled to assume that the transferee of stock in ordinary course had personally the means of seeing, or ought by self or agent to see, the actual execution of the transfer by the transferors. The purchase and transfer of stocks and shares on the Stock Exchange and elsewhere could never practically be carried out if the purchaser was in each case, having regard to his possible future dealings, bound to see by himself or his agent personally to the execution of the transfer by the transferor. And I think the corporation must be taken to have known this. The transferee is not, in reference to the transfer, in the same position as the corporation is with regard to the position of the transferor as registered owner of the stock; for the register of stockholders is in the possession of the corporation, and the corporation is bound to keep it correctly. This being so, it appears to me that all that could be assumed by the corporation as against the transferee sending in the transfer for registration was that the transferee had taken reasonable care in the matter, and had reasonable ground for believing and did believe that the transfer, which, on the face of it, purported to be executed by the transferors, was, in fact, so executed. No representation could, in my opinion, be implied, under the circumstances, against the transferee beyond what the corporation was entitled to assume against him as above

stated. I think, therefore, that no warranty of the execution of the transfer by the transferors ought to be implied as between the transferee and the corporation.

But I may point out that, even if some representation beyond what I have above stated could, under the circumstances, be implied as against the defendants, or even if a warranty could be implied as against them, it would not of necessity follow that a contract of indemnity should be implied. A warranty and a contract of indemnity are distinct; one important difference being the period from which the Statute of Limitations would run. And, in the present case, whatever other implications might be made against the defendants, I think it would not be right to imply a contract of indemnity.

STIRLING, L.J., read the following judgment: The facts which gave rise to this action may be stated very shortly. The plaintiffs are the Corporation of Sheffield, and have, under the authority of a private Act of Parliament, issued certain stock, bearing interest at $3\frac{1}{2}$ per cent. The Act imposes on the plaintiffs duties with respect to the registration of transfers of such stock and the issue of certificates to stockholders. The defendant Barclay is a member of a banking company (his co-defendants), who made an advance to customers on the security of what purported to be a transfer to him of 8,200*l.* of the corporation stock. This transfer he sent to the plaintiffs with a request that it might be registered, and new certificates issued. With this request the plaintiffs complied. The defendants' customers then sold the stock, and the defendant Barclay concurred in a transfer to the purchasers. Some years afterwards it was discovered that the transfer to the defendants was a forgery, and the plaintiffs were compelled to make good the loss to the true owners of the stock. This action is brought by the plaintiffs to obtain indemnity by the defendants against the loss thus sustained by the plaintiffs. It is admitted, on the one hand, that the plaintiffs acted without any negligence; and, on the other, that the defendants acted in perfect good faith.

The provisions of the plaintiffs' Act as to keeping a register of transfers and the issue of certificates do not materially differ from those contained in the Companies Act, 1862; and with reference

to them it was pointed out by the Court in *In re Bahia and San Francisco Railway* (13) that the effect was to make the shares of the company more easily dealt with, and, consequently, of greater value. This view was adopted and acted on by the House of Lords in *Balkis Consolidated v. Tomkinson* (14). The provisions of the plaintiffs' Act, although they impose a burden on the plaintiffs, are, nevertheless, to their advantage; for in the absence of them it might be presumed that the stock could not have been issued with equal advantage to the plaintiffs. The Act does not expressly confer any right of indemnity on the plaintiffs; and if any such right exists it must arise by implication of law. The main contention before us is that there is on the part of the defendants an obligation so arising. Now the mere performance of a duty imposed by law on any one holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. If, however, the person who owes the duty at the request of him to whom it is due departs from the strict legal course of performance of that duty or puts himself in a different position from that created by law, then a consideration may arise for a promise express or implied. This is illustrated by the cases relating to the indemnity of sheriffs, which were much relied on in the argument on behalf of the plaintiffs. It was decided in *Bridge v. Gage* [1605] (33) that a promise to pay money to a sheriff in consideration of his executing a writ of *elegit*, which the sheriff by the common law was bound to execute without remuneration, could not be enforced by action. In *Arundel v. Gardiner* [1621] (34) it was held that a promise made by an execution creditor to a sheriff to save him harmless in consideration that he would execute a writ of *fi. fa.* by seizing particular goods was enforceable. In *Humphrys v. Pratt* (5) a sheriff who had at the request of the execution creditor seized particular goods was held by the House of Lords to be entitled to an indemnity, although not expressly agreed to by the execution creditor. There is, unfortunately, no report of what was said by the noble and learned lords who addressed the House; but in *Collins v. Evans* (8) the *ratio decidendi* is explained by Chief Justice TINDAL in delivering the judgment of

(33) Cro. Jac. 103.

(34) Cro. Jac. 652.

the Exchequer Chamber. If, then, the goods are simply pointed out to the sheriff, and he is left to follow his discretion—that is to say, to take the legal course—he is not entitled to indemnity; but if he is required to seize them he is. The sheriff in the latter case gives up his right to make inquiry as to the ownership of the goods and takes steps for his own protection in case there should be forthcoming a claimant to them other than the judgment creditor, and puts himself in the position of a mandatory or agent of the execution creditor for the purpose of taking the goods; and is held to be entitled to the benefit of an implied agreement for his indemnity.

In the present case the plaintiffs were under a statutory obligation to register transfers and issue certificates; the defendants called on them to perform their duty under the statute with regard to the transfer which he forwarded to them; and, as it seems to me, they did nothing more. The plaintiffs were left to perform their legal obligations; they gave up no right, and assumed no different position to the defendants than that created by the statute; and, in my judgment, they are not entitled to the indemnity sought in the action.

Inasmuch as the defendant Barclay was admittedly innocent of anything in the shape of fraud, the plaintiffs had not, and did not in fact claim to have, any cause of action based on misrepresentation. It was suggested, though somewhat faintly, that the defendants warranted to the plaintiffs the genuineness of the transfer. In my judgment, the defendants did not give any such warranty. I think that the true nature of the transaction between the plaintiffs and the defendants is as stated by Lord LINDLEY (then Mr. Justice LINDLEY) in his judgment in the case of *Anglo-American Telegraph Co. v. Spurling* (10); but, further, it seems to me that, even if the warranty was given, the Statute of Limitations, which is pleaded, is an answer to any claim founded on it; for the warranty was broken and the cause of action (if any) accrued more than six years before the commencement of this action. The learned Lord Chief Justice based his decision on that of the Court of Appeal in *Simm v. Anglo-American Telegraph Co.* (10), which he held to be an authority for the proposition that as between two innocent parties, one of whom had innocently and without negligence handed in a forged transfer upon which a joint stock company

(under the Companies Act, 1862) was asked to act, the loss was to fall upon the person who handed in the transfer. I desire to point out that the position of the plaintiffs in that case does not in all respects resemble that of the defendant Barclay in the present. The bank for whom the plaintiffs in *Simm v. Anglo-American Telegraph Co.* (10) were trustees had, before action brought, received payment of their advances in full from their customers, who had not dealt with the stock or acted on the certificate issued by the company; whereas in the present case the defendant Barclay and his customers have dealt with the stock on the faith (as I understand) of the certificate issued by the Corporation of Sheffield. The materiality of this circumstance is shown by *Balkis Consolidated v. Tomkinson* (14), to which, unfortunately, the attention of the Lord Chief Justice does not appear to have been called. The House of Lords there held that a person who has procured the registration of an invalid transfer of shares in a joint stock company, and to whom certificates have been issued, is entitled, if he has sold the shares on the faith of those certificates, to recover damages from the company upon a refusal to register his purchasers as owners of the shares. It is quite true that there the invalidity was not the result of forgery, and that this was one of the grounds by which the case of *Simm v. Anglo-American Telegraph Co.* (10) was distinguished; but, at the same time, it seems to have been the opinion of Lord Justice BRETT and of Lord Justice COTTON that the plaintiffs in that action would, notwithstanding the forgery, have had a good title as against the company so long as the advances made by the bank remained unpaid. However this may be, all the learned Judges of the Court of Appeal expressly leave open the question raised by the action of *Anglo-American Telegraph Co. v. Spurling* (10), which Mr. Justice LINDLEY had decided adversely to the company. With that decision I agree; and, in my judgment, this appeal ought to be allowed.

Appeal allowed.

Solicitors: *R. F. & C. L. Smith*, agents for H. Sayer, Sheffield,
for the Plaintiffs.

Maples, Teesdale & Co., for the Defendants.

IN RE EVERSON, EX PARTE OFFICIAL RECEIVER.

1904, June 13. BIGHAM AND DARLING, JJ.

Bankruptcy—Appeal from County Court—Amount not exceeding 50l.—Leave to Appeal—High Court—Jurisdiction—Bankruptcy Appeals (County Courts) Act, 1884, s. 2—Bankruptcy Rules, 1886 and 1890, r. 129.

As the word "Court" in Bankruptcy Rule 129 means the original Court exercising jurisdiction in bankruptcy, an appeal cannot be brought from the order of a County Court relating to property not exceeding 50*l.* in value except by leave of that Court, and the High Court cannot give leave to appeal when it has been refused by the County Court.

THIS was an appeal from an order of the County Court Judge at Newport in Monmouthshire, dismissing an application of the Official Receiver, as trustee in bankruptcy, for an order declaring that a payment by the bankrupt of 16*l.* was fraudulent and void. The County Court Judge having refused leave to appeal, the Official Receiver (in the absence of WRIGHT, J., through illness) applied *ex parte* to BRUCE, J., at Chambers for leave to appeal, which was granted.

On the hearing of the appeal, a double preliminary objection was taken, that under Rule 129 (2) of the Bankruptcy Rules, 1886 and 1890 (1), the appeal could only be brought by leave of the County Court, and that the High Court could not give leave when it had been refused by the County Court.

Hansell, for the respondent:

First, by Rule 129 (2) (1), "Court" means the Court of first instance making the order, and "Court of Appeal" means the Court to which an appeal lies from that Court of first instance—here, the County Court and the Divisional Court respectively; see Rule 3A (2), and section 2 of the Bankruptcy Appeals (County Courts) Act, 1884 (8). Secondly, by section 168, sub-section 1 of

(1) "Except by leave of the Court no appeal to the Court of Appeal shall be brought from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed 50*l.*"

(2) The rule as to "interpretation of terms."

(3) Bankruptcy Appeals (County Courts) Act, 1884, s. 2: "... an

appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a County Court to a Divisional Court of the High Court, of which the Judge to whom bankruptcy business shall for the time being be assigned shall for the purpose of hearing any such appeal be a member. . . ."

the Bankruptcy Act, 1883, “ ‘the Court’ means the Court having jurisdiction in bankruptcy under this Act,” so that BRUCE, J., had no jurisdiction to give leave to appeal.

Muir Mackenzie, for the appellant:

The Divisional Court sitting to hear appeals in bankruptcy from County Courts can review the decision of a County Court Judge who has wrongly refused leave to appeal. Rule 134A of the Bankruptcy Rules provides that “any order or direction incidental” to such an appeal to the High Court may be given by the Judge of the High Court for the time being exercising jurisdiction in bankruptcy; and in the absence of WRIGHT, J., the Judge at Chambers could exercise that jurisdiction, as BRUCE, J., did. An application for leave to appeal can be made *ex parte*, and this must apply to an appeal to the High Court from a refusal to give leave. This Court cannot now disregard or review the order made by BRUCE, J., which has not been appealed from. In the bankruptcy case of *In re Armstrong, Ex parte Gilchrist* [1886] (4), Lord ESHER considered the question where leave to appeal had been refused by a Divisional Court but granted by the Court of Appeal, and said that the jurisdiction of the Divisional Court to give or refuse leave was a very delicate one.

Hansell, in reply:

In *Payne v. Esdaile* [1891] (5) the House of Lords considered the question of an appeal to the House of Lords from the refusal by the Court of Appeal to grant special leave to appeal, and allowed a preliminary objection to prevail.

BIGHAM, J.: I think this preliminary objection must prevail. It appears on the face of the notice of motion that the order of the County Court Judge, from which this appeal is brought, related to property of the value of less than 50*l*. The case, therefore, comes within Rule 129 (2) of the Bankruptcy Rules, which provides that “except by leave of the Court, no appeal to the Court of Appeal shall be brought” from such an order. There “Court” means, in my

(4) 3 M^{ORR}. 193; 17 Q. B. D. 521, 527; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709.

(5) [1891] A. C. 210; 60 L. J. Ch. 644; 64 L. T. 666; 40 W. R. 65.

opinion, the Court of first instance, and "Court of Appeal" means this Court when the appeal is from a County Court. The object of that rule is to prevent appeals in small and insignificant cases. This is, in my opinion, one of those cases; and the rule expressly provides that there shall be no appeal except by leave of the Court from which the appeal is being made. That leave has not been obtained, and therefore the condition precedent to the right to appeal has not been fulfilled. But it has been contended that the refusal of leave to appeal by the County Court Judge is an order from which an appeal can be brought to the High Court, and that Mr. Justice BRUCE, sitting in Chambers, has heard such an appeal in this case, and reversed the refusal of the County Court Judge and given leave to appeal. I do not think that the refusal by the County Court Judge to give leave to appeal is an order from which an appeal can be brought, and I think that the order made by Mr. Justice BRUCE cannot supply the want of the condition precedent to the right to appeal which is required by Rule 129 (2). This appeal must therefore be dismissed, as the objection prevails.

DARLING, J.: I am of the same opinion. Rule 129 (2) says that this appeal cannot be brought "except by leave of the Court," and it is conceded that that means the original Court exercising jurisdiction in bankruptcy—here the County Court. The appellant contends that, when leave to appeal has been refused, he can appeal from that refusal—that is, that he can appeal with the direct decision of the Court against him that he shall not appeal. If that is so, there would really be no meaning in the words "except by leave of the Court"; for there would be an appeal in every case by asking for leave to appeal, and, when it was refused, coming to the High Court. I do not think that that is what the rule means at all. I think the rule was intended to discourage appeals in cases under the amount of 50*l.*, and to put cases above that amount on a totally different footing.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade*, for the Appellant.

F. Kinch, agent for *Lyndon, Moore & Co.*, Newport,
Mon., for the Respondents.

IN RE PONSFORD, EX PARTE PONSFORD.

1904, July 29. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

Bankruptcy—Scheme—Rejection—Adjudication—Notice to Debtor—County Court—Application to Annul on Ground of Absence of Notice—Lapse of Time—Bankruptcy Act, 1883, s. 20, sub-s. 1—Bankruptcy Rules, 1886 and 1890, r. 192.

Though the Court has jurisdiction to adjudicate a debtor bankrupt after a resolution of the creditors to that effect under the Bankruptcy Act, 1883, s. 20, sub-s. 1, without any notice being given to the debtor, the proper practice, as well in the County Court as in the High Court, is that notice should be given to the debtor unless there is some special reason to the contrary.

THIS was an appeal against a decision of the Divisional Court.

A receiving order having been made against the debtor in the Newport County Court on 14 September, 1903, a scheme of arrangement was submitted by the debtor on 4 November. At the adjourned first meeting of creditors on 15 December, at which the debtor was present, the creditors rejected the scheme and resolved on an adjudication in bankruptcy. Immediately after the meeting, in the absence of the debtor, the order of adjudication was made on the application of the Official Receiver under the Bankruptcy Act, 1883, s. 20, sub-s. 1; Bankruptcy Rules, 1886 and 1890, r. 192 (1).

On 28 March, 1904, the debtor applied to the County Court Registrar to annul the order on the ground that it was made without notice, in his absence. The Registrar refused the application, and the Divisional Court (BIGHAM, J., and DARLING, J.)

(1) Bankruptcy Act, 1883, s. 20, sub-s. 1: "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within 14 days after the conclusion of the examination of the debtor or such further time as the Court may allow,

the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

Bankruptcy Rules, r. 192: "Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof the Court may, on the application of the Official Receiver, or of any person interested, adjudge the debtor bankrupt."

affirmed the order of the Registrar, holding that the application was rightly dismissed on the ground that it was too late; but the Court expressed its approval of the practice of the High Court laid down by CAVE, J., in 1885, which requires notice to be served on the debtor of the application for adjudication in such cases.

The bankrupt appealed.

S. G. Lushington (Muir Mackenzie with him), for the appellant:

The effect of an adjudication in bankruptcy is to affect the status of the debtor—see sections 81 and 82 of the Bankruptcy Act, 1883; and on general principle the necessity for notice being given in such a case is shown by *Rex v. Cambridge University, Dr. Bentley's Case* [1768] (2). Where an adjudication without notice to the debtor is permissible the Bankruptcy Rules expressly mention that such notice need not be given—as, for instance, Rule 190, which provides for adjudication on the application of the debtor himself, and Rule 192A, where the public examination of a debtor is adjourned *sine die*. There is no such mention in Rule 191, which provides for adjudication by third parties, or in Rule 192, which is the rule applicable to the present case, from which it is to be inferred that notice is necessary. Form 49 gives the form of notice intended to be given to the debtor. In the High Court, in accordance with the direction given by CAVE, J., in 1885, it is the practice to give notice to the debtor in cases under section 20, sub-section 1 (1); and the same rule should apply in the County Court.

[He also referred to *In re Pinfold, Ex parte Pinfold* [1891] (3).]

[VAUGHAN WILLIAMS, L.J., referred to the Bankruptcy Act, 1883, s. 104, sub-s. 5, empowering the Court to make an adjudication on an application for committal of the debtor.]

The debtor there has notice of the application for committal, and knows, or must be taken to know, the statutory consequences.

(2) 1 Str. 557.

(3) 8 Morr. 312; [1892] 1 Q. B. 73; 61 L. J. Q. B. 161; 65 L. T. 683; 40 W. R. 223.

[ROMER, L.J. : Rule 850 expressly provides that non-compliance with any rule of practice shall not render any proceeding void ; and see section 143, sub-section 1 of the Bankruptcy Act, 1883. Can the delay on the part of the debtor be justified ?]

The debtor in the present case has not been guilty of such delay as to prejudice his present application.

H. Reed, K.C., and *Corner*, for the respondent (the trustee), were not called on.

VAUGHAN WILLIAMS, L.J. : We are of opinion that the delay of the debtor in the present case is fatal to his application, and that on this ground the decision of the Divisional Court ought to be affirmed.

As to the question of practice under section 20, sub-section 1 of the Bankruptcy Act, 1883, whether notice should or should not be given to the debtor of an intention to apply for an adjudication in bankruptcy against him, I wish to say first that under that section the Court has jurisdiction in a proper case to make an adjudication after a resolution of the creditors to that effect without giving any notice to the debtor ; but although I have no doubt as to the jurisdiction, I also have no doubt that, as a matter of practice, the practice which has been adopted in the High Court under the direction given by Mr. Justice CAVE in 1885—namely, to give notice to the debtor—is the most convenient practice to adopt ; and I agree with the observations of counsel for the appellant as to the effect of an adjudication in altering the status of the debtor. Therefore, although I think that there is no doubt about the jurisdiction, still, speaking generally, unless there is some reason to the contrary, it is certainly the more convenient practice that notice should be given. I feel some doubt whether the direction given by Mr. Justice CAVE would really govern the practice of the County Courts ; but I think the practice Mr. Justice CAVE laid down is the most convenient, and no doubt it will be adopted in the County Courts in the future. When this matter came before the Divisional Court, the Court decided it not on any question of jurisdiction, but on the ground that the delay was

fatal to the application; with which decision I entirely agree, and the appeal must also be dismissed on that ground.

ROMER, L.J., and COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitors: *Robert Carter*, for the Appellant.

Taylor, Willcocks & Co., agents for *Gardner & Herbert*, Newport, Mon., for the Respondent.

IN RE SOLOMONS, EX PARTE SOLOMONS.

1904, November 11. C. A. VAUGHAN WILLIAMS, ROMER, AND COZENS-HARDY, L.JJ.

Bankruptcy—Record Book kept by Trustee—Minutes of Meetings of Committee of Inspection—Right of Debtor to Inspect—Bankruptcy Act, 1883, s. 80—Bankruptcy Rules, 1886, rr. 12, 16, 285, 287, and 292.

A debtor has no right to inspect the "record book" kept by the trustee in his bankruptcy in pursuance of section 80 of the Bankruptcy Act, 1883, and Rule 285 of the Bankruptcy Rules, 1886, and the Court has no power to make any order giving him leave to do so.

Decision of BIGHAM, J. (1), affirmed.

APPEAL from decision of BIGHAM, J.

The facts are fully stated in the report of the case in the Court below. The debtor was adjudicated bankrupt on 15 December, 1898, and a trustee was appointed, with a committee of inspection. The debtor applied to the Court for an order giving him leave to inspect the "record book" kept by the trustee in his bankruptcy in pursuance of section 80 of the Bankruptcy Act, 1883, and Rule 285 of the Bankruptcy Rules, 1886. He wished to inspect all records of minutes of the meetings of the committee of inspection and copies of letters addressed to some of the creditors by the trustee, his object being to obtain material on which to found proceedings against the trustee.

BIGHAM, J., refused the application, being of opinion that it was

(1) *Ante*, p. 268; [1904] 2 K. B. 760; 73 L. J. K. B. 963.

contrary to the practice of the Court to permit the debtor to make such an inspection, and he had not shewn exceptional circumstances to justify any departure from the settled practice.

The debtor appealed.

The *Debtor* in person.

[The Court declined to consider whether the circumstances were such as to make it proper that an order should be made until they were satisfied that there was a right of inspection.]

[Section 80 of the Bankruptcy Act, 1883, and Rules 12, 16, 285, 287, and 292 of the Bankruptcy Rules, 1886, were referred to during the argument.]

Muir Mackenzie and *Francke*, for the Official Receiver, were not called upon.

VAUGHAN WILLIAMS, L.J. : The only thing which we have to consider is whether the debtor has a right to inspect this record book, and after looking at section 80 of the Bankruptcy Act, 1883, and Rules 285 and 287 of the Bankruptcy Rules, 1886, we are of opinion that the debtor has no right to inspect the book. If he wishes to see the proceedings of the Court he can do that, and he can obtain office copies of them under Rule 16 ; but he has no right to see the record book, and we have no power to make any order giving him leave to do so.

ROMER, L.J., and COZENS-HARDY, L.J., concurred.

Appeal dismissed.

Solicitor : *Solicitor to the Board of Trade*, for the Official Receiver.

IN RE ROSE, HASLUCK v. ROSE.

1904, June 30; July 31. FARWELL, J.

*Bankruptcy—Limited Power of Appointment—Right of Trustee to Release—
“Power”—Bankruptcy Act, 1883, s. 44—Conveyancing and Law of Property
Act, 1881, s. 52, sub-s. 1.*

The right of the donee of a power of appointment to release such power, whether inherent or given him by section 52, sub-section 1 of the Conveyancing and Law of Property Act, 1881, is not a “power in or over or in respect of property” within the meaning of section 44 of the Bankruptcy Act, 1883, and cannot accordingly be exercised by virtue of that section by his trustee in bankruptcy.

By his will, dated 21 March, 1887, the late Sir John Rose, Bart., gave all his real and the residue of his personal estate to certain trustees upon trust (*inter alia*) as to the sum of 25,000*l.*, that they should pay the interest thereof to his son, Edward Temple Rose, till (*inter alia*) his death or bankruptcy; and after his death upon trust for all or such of his children, or of his brothers and sisters, or of his nephews and nieces, as the said E. T. Rose should by deed, with or without power of revocation and new appointment, or by will or codicil, appoint; and, in default of appointment, upon trust for all of the children of E. T. Rose living at the testator's death, or born afterwards, who, being sons, should attain the age of twenty-one years, or being daughters, should attain that age or marry; and in case there should be no children or appointees, of E. T. Rose, who should attain a vested interest in the sum in question, then upon trust for the said E. T. Rose, his executors, administrators, and assigns.

The testator died on 24 August, 1888, without having altered or revoked his will, which was proved on 20 September, 1888.

E. T. Rose was adjudicated a bankrupt on 19 January, 1892; and on 25 January, 1892, Lawrence Hasluck was duly appointed his trustee in the bankruptcy.

E. T. Rose had married his present wife on 28 July, 1883, but there had been no children of the marriage.

By a deed-poll dated 2 May, 1902, and in purported exercise of the power conferred upon him by the Bankruptcy Act, 1883, and of every or any other power him thereto enabling, the trustee released the above-mentioned sum of 25,000*l.* from the above-mentioned

power of appointment, to the intent that the said power might be utterly extinguished, and that the ultimate trust in favour of E. T. Rose, his executors, administrators, and assigns, might become absolute, subject only to the trusts contained in the will for the benefit of his children (if any) in default of appointment.

On 23 October, 1902, the trustee entered into a contract with the British Empire Mutual Assurance Co. for the sale to them of the said contingent interest in the sum of 25,000*l*.

The British Empire Mutual Assurance Co. now required that the power of appointment should be released by E. T. Rose himself. The present summons was thereupon taken out by the trustee for a declaration that his own release was sufficient under section 44 of the Bankruptcy Act, 1883.

Upjohn, K.C., and *E. Ford*, for the trustee in bankruptcy :

It is not disputed that the bankrupt himself has capacity to release this power of appointment. That capacity, accordingly, is itself a "power" within the meaning of section 44 (ii.) of the Bankruptcy Act, 1883 (1), and the trustee is therefore enabled to exercise it by virtue of the authority conferred on him by the section. "Powers" in this section are not confined to mere conveyancing powers, such as those that form the subject of the treatise by Lord St. Leonards; this is clear from the fact that the section contemplates the possibility of their including the right to appoint to a vacant benefice.

[FARWELL, J. : I have never before heard it suggested that the capacity to release a power was itself a power: *In re Armstrong, Ex parte Gilchrist* [1886] (2).]

<p>(1) Bankruptcy Act, 1883, s. 44: "The property of the bankrupt divisible amongst his creditors, and in the Act referred to as the property of the bankrupt, shall . . . comprise . . .</p> <p>"(ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in</p>	<p>respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."</p>
--	---

(2) 3 Morr. 193; 17 Q. B. D. 521, 526; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709.

The "powers" contemplated by section 44 (ii.) are wider than mere powers "in or over" property: they include powers "in respect of" property also. The case of *In re Nichols to Nixey and Coleclough* [1885] (3) turns on quite a different point, and has no bearing on the present case. If, however, it be argued that the common-law power inherent in every donee of a limited power to release it is not in itself a "power" within the meaning of section 44 (ii.), yet the statutory power so to release it created by section 52, sub-section 1 of the Conveyancing Act, 1881 (4), is clearly such a "power."

Jenkins, K.C., and Bischoff, for the trustees of the settlement :

The capacity to release a limited power of appointment, whether common-law or statutory, is not a "power" within the meaning of section 44 (ii.) of the Bankruptcy Act, 1883. Again, it is not certain in the present case that the bankrupt's capacity to release is "for his own benefit"—it might possibly enure for the benefit of children still unborn. There is no decision on the exact point now in question; but there are certain analogous cases. Thus, in *Simpson v. Bathurst*, *Shepherd v. Bathurst* [1869] (5), it was decided that a power of granting renewed leases was not extinguished or suspended by reason of the bankruptcy of the donee of the power. Again, in *In the goods of Turner* [1886] (6), it was held that the right of the husband to administer his dead wife's estate did not vest in the trustee in his bankruptcy by virtue of section 44. Again, in *Buckland v. Papillon* [1866] (7), it was expressly pointed out by Lord CHELMSFORD, L.C., that the option to take a lease was not a "power" within the meaning of section 147 of the Bankruptcy Act, 1849. There is, however, a more completely analogous case on section 120, sub-section (b) of the Lunacy Act, 1890 (*In re*

(3) 29 Ch. D. 1005; 55 L. J. Ch. 146; 52 L. T. 803; 33 W. R. 840.

(4) Conveyancing and Law of Property Act, 1881, s. 52, sub-s. 1: "A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power."

(5) L. R. 5 Ch. 193; 18 W. R. 772.

(6) 12 P. D. 18; 56 L. J. P. 41; 57 L. T. 372; 55 W. R. 384.

(7) L. R. 2 Ch. 67, 70; 36 L. J. Ch. 81, 83; 15 L. T. 378; 15 W. R. 92; 12 Jur. (N.S.) 992.

Hirst [1892] (8)), in which it was decided that the capacity to release a power was not a "power" within the meaning of that section.

E. Ford, in reply, referred to section 6 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39).

FARWELL, J.: This question turns on the construction of section 44 of the Bankruptcy Act, 1883—a section that deals with the property of a bankrupt that is liable to be divided among his creditors, and which comprises (among other things) the division, familiar to lawyers, of the sum of a man's beneficial interests—that is, property which actually belongs to him, and property over which he may exercise some power for his own benefit. Now it has been held by a series of decisions—although I think that probably, as is pointed out by Vice-Chancellor KINDERSLEY, in *Coffin v. Cooper* [1865] (9), it was originally so held somewhat contrary to principle—that the donee of a limited power of appointment may release it; and it is now said that that power of release is a "power" "in or over or in respect of property," within the meaning of section 44—that is, that the capacity to release a power is itself a power within the meaning of the statute. If this be true, we get, as it were, a sort of series of powers—first, a power of appointment; then, secondly, a power to release that power; and thirdly, a power to release that power to release that power; and so on, I suppose, *ad infinitum*. But, in my opinion, this is not the meaning of the Act. I think that the "powers" referred to in the section are those powers that are familiar to all lawyers, and that are properly so called. The capacity of releasing a power is not, in my judgment, properly described as a power at all. I will take the case as it is stated by Vice-Chancellor KINDERSLEY, a most accurate lawyer, in *Coffin v. Cooper* (9), in a judgment in which he was protesting, if anything, against the decision that he felt himself constrained by authority to give—that is, that the donee of a limited power was at liberty to release it. He says, "First it was decided that the donees (*sic*) [of a power to appoint among children by will] may

(8) 67 L. T. 702; 2 R. 409.

(9) 34 L. J. Ch. 629, 631, 632; 8 N. R. 459; 2 Dr. & Sm. 365, 373, 375; 12 L. T. 106; 13 W. R. 571.

release it ; in other words, may bind himself (*sic*) not to exercise the power at all, so that any subsequent exercise of the power will be void, whatever circumstances may arise, to make it desirable, with a view to the benefit of the children, that the power should be exercised." That is to say, the donee has, not what is technically called a "power," but a capacity for contracting so as to bind the exercise of the power, which, if he does not exercise it, is fiduciary. In my opinion, that capacity is not a "power" within the meaning of section 44.

Then, it is said that section 52, sub-section 1 of the Conveyancing Act, 1881, provides that a person to whom any power, whether coupled with an interest or not, is given, may, by deed, release or contract not to exercise that power ; and it is argued that this provision constitutes what is known as a statutory power, and that this statutory power is a "power" within the meaning of section 44 of the Bankruptcy Act, 1883. In my opinion that is not the case. I think it has been said—and, if so, said rightly—that section 52 of the Conveyancing Act, 1881, only declared the already existing law, and did not add anything further. But even if the section did add anything further, I do not think that it constituted anything that is properly called "a power." It declares that a man has a certain capacity for releasing, but I do not see that the capacity can properly be called a "power."

I think, moreover, that I am bound by the decision of the Court of Appeal in an analogous case under the Lunacy Act, 1890. Section 120 of that Act is framed, it will be observed, somewhat after the model of section 44 of the Bankruptcy Act, 1883. [His Lordship read the two sections.] I do not myself see any practical difference between those two sections, except, perhaps, that the section in the Lunacy Act may be thought a trifle the wider of the two. In the latter Act there are no such words as "in or over, or in respect of property." Now, in *In re Hirst* (8), the case to which I have referred, there was an application before Lords Justices LINDLEY, BOWEN, and A. L. SMITH, in which the committee of a lunatic desired, under most meritorious circumstances, to have authority to release a power, in order that the lunatic, who was a tenant for life and had inadequate means of maintenance, might be supported out of certain property, which passed, on his death, and

in default of appointment, to an only son, who desired that this step should be taken. But the Court of Appeal held that they had no authority to release the power under section 120 of the Lunacy Act, 1890. I apprehend that this is a decision that the section in question does not extend to the release of a power of appointment. If the capacity to release the power in the present case were really, as counsel for the trustee in bankruptcy have tried to persuade me, a "power" within the meaning of section 44 of the Bankruptcy Act, 1883, it would also be a "power" within the meaning of section 120 of the Lunacy Act, 1890. In my opinion it is not so; and I confess I should feel considerable reluctance in extending the anomalous right which the donee of a special power possesses to debar himself from exercising it into a right in his trustee in bankruptcy to debar a parent from doing what it might ultimately seem to him to be his duty to do.

Although I am bound to hold that the donee of a power such as this can release it, yet I am very far from being prepared to decide that somebody else, who is not the donee of the power, and who cannot exercise the power, is yet to be at liberty to release it. I am not bound so to decide; and the consequence is that this application fails, and must be dismissed with costs (10).

Solicitors: *Henry Hilbery & Son*, for the Trustee in Bankruptcy.
Bompas, Bischoff, Dodgson, Coxe & Bompas, for the Defendants.

(10) From this decision the trustee in bankruptcy appealed. On the hearing of the appeal facts were brought to the attention of the Court as to the absence of parties who might possibly be interested under the power, and their Lordships were of opinion, having regard to those facts, that the proceedings on the present summons would be ineffective even if they were to decide in favour of the appellant; and at the suggestion of the COURT the parties agreed that an order should be made discharging by consent the order of FARWELL, J., the appellant paying the respondents' costs of the appeal as between solicitor and client.

RUBEN AND ANOTHER v. GREAT FINGALL
CONSOLIDATED, LIMITED, AND OTHERS.

1904, June 20, 21, 23, 27, 28, 29; July 29. C. A. COLLINS, M.R.,
STIRLING AND MATHEW, L.JJ.

Company—Share Certificate—Forgery by Secretary—Estoppel.

The articles of association of a company directed that the certificates of title to shares in the company should be issued under the seal of the company and signed by two directors and countersigned by the secretary. The secretary, in order to procure a loan for his own purposes, gave, as security to the plaintiffs, a document purporting to be a certificate for 5,000 shares in favour of certain nominees of the plaintiffs. This document appeared to be regular on the face of it, being sealed apparently with the seal of the company, signed by two directors, and countersigned by the secretary; but, in fact, the seal had been affixed without authority, and the signatures of the two directors had been forged by the secretary. On the faith of this document the plaintiffs procured from their nominees and advanced to the secretary the sum of 20,000*l.* They then applied to have their nominees registered as holders of 5,000 shares. The company, having discovered the fraud of the secretary, refused to register the nominees of the plaintiffs. In an action to recover damages for the refusal:—

Held, that the company were not estopped from denying the plaintiffs' title to 5,000 shares, and from refusing to register the nominees of the plaintiffs, inasmuch as the actual scope of the secretary's authority did not cover any acts other than those of a purely ministerial character, such as bringing the certificate before the directors and appending the seal of the company in their presence.

Shaw v. Port Philip Gold-Mining Co. (1) discussed.

THIS was an appeal from the judgment of KENNEDY, J., on further consideration.

The action was brought to recover damages for the refusal by the defendant company to register as the holders of 5,000 shares two persons named Max Rosenhain and Edmonde Alexandre, who on the faith of a forged certificate of those shares had advanced to the plaintiffs a sum 20,000*l.* This sum was lent by the plaintiffs to one A. S. Rowe, who was the secretary of the defendant company, and who had forged the certificate in question for the purpose of procuring the loan of 20,000*l.* Owing to the refusal of the defendant company to register Rosenhain and Alexandre, the plaintiffs were compelled to repay to them the sum of 20,000*l.* lent to Rowe, who had absconded. The plaintiffs contended that the

defendant company were estopped from denying the right of Rosenhain and Alexandre to be registered. The following statement of facts is, with slight additions, taken from the written judgment of KENNEDY, J.

The defendant company was incorporated in the year 1899 to acquire the undertakings of two other mining companies in Western Australia. Article 12 of its articles of association was in these words: "The certificates of title to shares shall be issued under the seal of the company, and signed by two directors, and countersigned by the secretary or some other person appointed by the directors."

A. S. Rowe, a partner in the defendant firm of Bewick, Moreing & Co., was in December, 1902, the secretary of the defendant company. He held that appointment under a written agreement of 31 December, 1900, between the defendant company and Bewick, Moreing & Co., whereby Bewick, Moreing & Co. undertook to provide the defendant company with suitable offices and office accommodation, a suitable secretary, to be approved of by the company, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing & Co., but was to be deemed to be the secretary and officer of the defendant company, and subject to dismissal by the defendant company at any time. Bewick, Moreing & Co. were to receive 500*l.* a year from the defendant company and also all transfer fees received by the defendant company. The defendant company's registered office in December, 1902, was in the offices of Bewick, Moreing & Co., 20, Copthall Avenue, E.C., and several limited companies were housed and provided for by Bewick, Moreing & Co. there under similar arrangements.

The plaintiffs were a firm of stockbrokers in the city, with whom Rowe had for some months before December, 1902, done business on his own private account in stock and share transactions. They knew he was a partner in Bewick, Moreing & Co. They did not know that he was secretary of the defendant company. They believed him to be a director of it. He had been introduced to the plaintiffs as a person in good credit; he kept his engagements, and they had every confidence in him. With Lindo, one of the partners in the plaintiffs' firm, Rowe was on terms of social

acquaintance. In December Rowe saw Lindo and asked whether the plaintiffs could arrange a loan for him on 5,000 shares in the defendant company. He said he had a joint account with a friend, who wished to sell, and he desired to take over the friend's interest, and so avoid a sale, because, on information which he had received, he believed the shares, which were then at a premium, would rise considerably in value. He wanted the loan for a short time only, and, as the 5,000 shares afforded at the price of the day ample security for the 20,000*l.* which he wanted on loan, and as he undertook, if there was any fall in price, to provide a 2*l.* per share margin, the plaintiffs agreed to try and meet his wishes. On 16 December the plaintiffs arranged with Lazard Bros. & Co., bankers in the City, who had been made by the plaintiffs defendants in this action in order that all the parties might be before the Court, for the advance of 20,000*l.* to themselves for the principal on the proposed security, and Lindo, on the same day, went to the offices of Bewick, Moreing & Co., which were also the offices of the defendant company, and told Rowe that the money would be ready on 18 December. Rowe said that he would have a share transfer executed by the transferor on the following day. The shares, he said, were standing in the company's books in his friend's name and not in his own. On 17 December the transfer, with the names of the transferees, Rosenhain (a partner in the bank) and Alexandre, who appears as a formal defendant in this action, upon it, was taken by Lindo to Rowe, and later in the same day it was returned by Rowe to Lindo, and purported to have been executed by "E. Storey" as transferor. A shareholder of that name was called as a witness at the trial, and deposed that he was interested at the time in 5,000 shares, but that he was the registered owner only of 2,000. In the corner of the document was the usual "certification." Rowe, when he gave Lindo the transfer, said that his directors—that is, the directors of the defendant company—would be meeting the next day at 11 a.m., that he would explain everything to them, and have the share certificate made out in the names of Rosenhain and Alexandre, and that it would be ready for Lindo if he called at 11.30 a.m. The same afternoon Lindo brought back to Rowe the transfer executed by the transferees, paid to him a registration fee of 2*s.* 6*d.*, and received a receipt in due form. On

18 December, at 11.30 a.m., at the office, Rowe delivered to Lindo the share certificate, and Lindo returned the receipt to Rowe.

The certificate thus issued was in form perfectly regular. It purported, in accordance with article 12 of the articles of association of the defendant company, to bear the seal of the defendant company, to be signed by two of its directors, and to be countersigned by the defendant company's secretary. Lindo learnt from it for the first time that Rowe was the company's secretary. The certificate was taken by Lindo to the plaintiffs' office, where it was examined by their clerk, and it was then taken by him to the office of Lazard Bros. & Co., where it was left, and, after its examination by a clerk there, their cheque for 20,000*l.* in favour of the plaintiffs was handed to Lindo. This cheque was paid by the plaintiffs into their own banking account, and a cheque of the plaintiffs for the same amount, less stamp fee and commission, was handed over to Rowe the same day, and was subsequently cashed by him. Within ten days Rowe absconded, and it was discovered that the certificate was a forgery. The only genuine part of it was Rowe's countersignature as secretary. The signatures of the two directors which it bore were forged, and the seal of the company which it also bore had been fraudulently affixed to it by Rowe, who, as secretary, had access to it at all times and practically the custody of it, in the safe of the defendant company.

Lazard Bros. & Co., by their solicitors, applied to the defendant company for the registration of Rosenhain and Alexandre in the books of the defendant company as the owners of the shares. The defendant company refused to accede to the application. Then Lazard Bros. & Co. applied to the plaintiffs for the equivalent security or repayment of the loan of 20,000*l.* The plaintiffs paid Lazard Bros. & Co. the amount of the loan, with interest, and thereupon, as the defendant company refused to register the ownership of Rosenhain and Alexandre or recognise their title to the shares, they brought the present action, after obtaining from Lazard Bros. & Co. an assignment of their rights (if any), and giving written notice of such assignment to the defendant company.

Under these circumstances the plaintiffs claimed against the defendant company. They also claimed against Bewick, Moreing

& Co. as the partners of Rowe. Lazard Bros. & Co. and Alexandre were defendants only in form.

The action came on for trial before KENNEDY, J., with a special jury.

After evidence of witnesses called by both parties, from which the history of the case set forth above has been taken, certain statements or admissions of material facts were agreed to by the counsel for the respective parties, which left no question necessary or proper to be put to the jury.

These statements or admissions of fact were as follows : Agreed—First, that the alleged certificate was not a valid or genuine document, and that the signatures thereon, other than the signature of Rowe, were forgeries ; secondly, (a) that the bank (Lazard Bros. & Co.) and the plaintiffs respectively made the advances upon the faith of the genuineness and validity of the alleged certificate and of its being properly issued, and (b) that the secretary was a proper person to deliver it ; thirdly, that Rowe, in creating and delivering to Lindo the alleged certificate, acted fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage ; fourthly, that the defendant company did not by its directors or otherwise authorise Rowe to make, seal, or issue the alleged document ; and fifthly, that during the month of December, 1902, at all events, Rowe was a partner in the firm of Bewick, Moreing & Co.

On behalf of the plaintiffs it was submitted that there was still a question to be left to the jury, as to the liability of the defendants Bewick, Moreing & Co., under section 10 of the Partnership Act, 1890 ; but the learned Judge ruled that no case had been made out against Bewick, Moreing & Co. The jury was accordingly discharged.

KENNEDY, J., on further consideration, gave judgment for the plaintiffs, being of opinion that the defendant company were estopped from denying the title of the plaintiffs to 5,000 shares.

The defendants (Great Fingall, Limited) appealed.

Lawson Walton, K.C., and Bankes, K.C. (Bremner with them),
for the defendants :

The whole of the relations of the plaintiffs with Rowe were with him in his private capacity. The plaintiffs never approached the

defendants directly. There is no ground for saying that Rowe was acting as agent for the defendants when he handed over the certificate to the plaintiffs. It is said that a certificate issued by a company under their seal estops the company from denying its validity. That is far too wide a proposition. The question must be whether the certificate was forged or genuine. This was a forgery of the seal of the company. It is just as much a forgery of the company's seal as would be a forgery of a bill of exchange purporting to be signed by a person if some one else wrongfully signed it.

It is sufficient for the defendants to show that the act done by Rowe was not done on their behalf, but fraudulently and on his own behalf. The general principle upon which an employer is responsible for the acts of his servant has been well settled in a long series of cases. The employer is only liable when the act done by the servant was done within the scope of his employment, and in what the servant believed to be the interest of the employer, and not when the act is outside the scope of his employment: *Turberville v. Stampe* [1697] (2); *M'Manus v. Crickett* [1800] (8); *Limpus v. London General Omnibus Co.* [1862] (4); *Barwick v. English Joint-Stock Bank* [1867] (5); *M'Gowan v. Dyer* [1878] (6); *British Mutual Banking Co. v. Charnwood Forest Railway* [1887] (7); *Thorne v. Heard* [1894] (8); and *George Whitechurch, Limited v. Cavanagh* [1901] (9). This was not a certificate: it was a mere piece of paper like a certificate, just as a photograph might be. It is a mere imitation of the document by the wrongful affixing of the seal; it is not the act of the company. This view was taken in *Merchants of the Staple of England v. Bank of England* [1887] (10), where

(2) 1 Ld. Raym. 264.

(3) 1 East, 106; 5 R. R. 518.

(4) 1 H. & C. 526; 32 L. J. Ex. 34; 7 L. T. 641; 11 W. R. 149; 9 Jur. (N.S.) 333.

(5) L. R. 2 Ex. 259; 36 L. J. Ex. 147.

(6) L. R. 8 Q. B. 141; 21 W. R. 560.

(7) 18 Q. B. D. 714; 56 L. J. Q. B. 449; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.

(8) [1894] 1 Ch. 599; 63 L. J. Ch. 356; 70 L. T. 541; 42 W. R. 274; 7 R. 100.

(9) 9 Manson, 351; [1902] A. C. 117; 71 L. J. K. B. 400; 85 L. T. 349; 50 W. R. 218.

(10) 21 Q. B. D. 160; 57 L. J. Q. B. 418; 36 W. R. 880; 52 J. P. 580.

WILLS, J., treated the fraudulently affixing of the seal as a forgery. This case is distinguishable from *Shaw v. Port Philip Gold-Mining Co.* [1884] (1), because there is no evidence that the defendants held out Rowe as their agent. MATHEW, J.'s judgment in *Shaw v. Port Philip Gold-Mining Co.* (1) turned largely upon that point. That case proceeded on the basis that the secretary was acting for the benefit of the company. The whole transaction there was different from the facts in this case. Moreover, the decision in that case is qualified by *British Mutual Banking Co. v. Charnwood Forest Railway* (7) and *George Whitechurch, Limited v. Cavanagh* (9). In *Balkis Consolidated Co. v. Tomkinson* [1893] (11) it was argued that *Shaw v. Port Philip Gold-Mining Co.* (1) was overruled by the *Charnwood Forest Case* (7).

Although the thing which is to be done by a servant may be within the scope of his authority, yet if it turns out that a particular representation was made by the servant, not in the employers' interest, but to perpetrate a fraud of his own, the employers are not liable. That the certificate, being a forgery, is worthless, is clear from the opinion of Lord HATHERLEY in *Mahony v. East Holyford Mining Co.* [1875] (12); see also *Bank of Ireland v. Evans's Trustees* [1855] (18) and *Merchants of the Staple of England v. Bank of England* (10). In *In re Bahia and San Francisco Railway* [1868] (14), *In re Ottos Kopje Diamond Mines* [1892] (15), and *Balkis Consolidated Co. v. Tomkinson* (11) there was a genuine certificate issued by the company. In *George Whitechurch, Limited v. Cavanagh* (9) some distinction was made by some of the law Lords between certification and a certificate; but it must be taken that their Lordships were referring to genuinely issued certificates. At all events, the point as to any such distinction was not argued and was not decided.

The certificate being a forgery and a mere nullity, nothing can

(11) [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 42 W. R. 204; 1 B. 178.

(12) L. R. 7 H. L. 869, 899; 33 L. T. 338; Ir. R. 9 C. L. 306.

(13) 5 H. L. C. 389; 3 W. R. 573.

(14) L. R. 3 Q. B. 584; 9 B. & S. 844; 37 L. J. Q. B. 176; 18 L. T. 467; 16 W. R. 862.

(15) [1893] 1 Ch. 618; 62 L. J. Ch. 165; 68 L. T. 138; 41 W. R. 258; 2 B. 257.

be made of the section in the Companies Act, as that section refers to genuine certificates and was introduced with the object of facilitating evidence.

The case then resolves itself into a question of principal and agent, or of master and servant. It is a misapprehension to suppose that a secretary stands in a special class; he is in the ordinary position of a servant: see per Lord MACNAGHTEN in *George Whitechurch, Limited v. Cavanagh* (9), and per Lord ESHER, M.R., in *Barnett, Hoares & Co. v. South London Tramways Co.* [1887] (16).

Rufus Isaacs, K.C., and J. D. Crawford, for the plaintiffs:

On the question of fact, Rowe, as secretary, was the proper person to apply to for the certificate. Money would not have been advanced except on the faith of the validity of the document. The fee of 2s. 6d. was paid to Rowe as secretary. There was a representation by the company through its secretary—a person having authority—that this was a valid document, giving a title to the 5,000 shares; the company are therefore estopped from denying the validity of the certificate. *Shaw v. Port Philip Gold-Mining Co.* (1) is still good law, and is on all fours with the present case. *Barwick v. English Joint-Stock Bank* (5) is an authority in the plaintiffs' favour, inasmuch as the act which the secretary was doing was one of the particular class of acts which he was held out by the company as within his authority to do. *In re Bahia Co.* (14) and *Balkis Consolidated Co. v. Tomkinson* (11) are also in favour of the plaintiffs on the question of estoppel. A certificate stands in an entirely different position from any other kind of representation, such as a certification: see the observations of Lord JAMES OF HEREFORD in *George Whitechurch, Limited v. Cavanagh* (9). There are excellent business reasons for the distinction between a certificate and certification. The certificate is the solemn act of the company: it has emanated from the company's offices, and was given out by a person held out as the person to give it. In view of that, it is wholly immaterial that the directors' signatures were forged. If the certificate comes from the proper quarter, it

(16) 18 Q. B. D. 815, 817; 56 L. J. Q. B. 452, 453; 57 L. T. 436; 35 W. R. 640.

is an irrebutable evidence of title. The evidence here shows that the secretary had the absolute physical control of the keys and the seal of the company, and it was his duty to see to the performance of the whole work of transferring shares in the company. His duties were exactly the same as the duties of the secretary in *Shaw v. Port Philip Gold-Mining Co.* (1); and so far as that case is an authority here, it exactly covers the present case. In considering a case like the present, the Court should apply the old rule laid down by ASHURST, J., in *Lickbarrow v. Mason* [1789] (17), that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. The argument put forward on behalf of the defendants is that a principal is responsible for his agent's fraud when the object of the agent is to benefit himself, although the agent's act is one of a class that he is authorised to do. That was exactly the contention that was rejected by the Court of Appeal in *Hambro v. Burnand* [1904] (18), where MATHEW, J., pointed out that it would be fatal to the transaction of mercantile business if persons dealing with brokers or other agents were bound to inquire into the motives with which they seek to contract on behalf of their principals.

[COLLINS, M.R. : In that case there was express authority to the agent to do the act, while in this case it is said that there was no authority to do the act complained of. Here the agent had authority to deliver the certificates, and he was the only person to get the sanction of the directors.]

In *Hambro v. Burnand* (18) much stress was laid upon the authority being written, but the fact of its being in writing is not material. Whether the authority be written, verbal, or implied, it is all one. In any case, the agent would of course not be authorised to commit a fraud. The only question is whether he had authority to do in the ordinary course the acts which he did with the intention of committing a fraud. In principle, *Hambro v. Burnand* (18) governs

(17) 2 Term Rep. 63; 1 Sm. L. C. (11th ed.) 693, 701.

(18) [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251.

the present case. *George Whitechurch, Limited v. Cavanagh* (9) only shows a secretary of a company has no authority to issue shares—that a secretary's authority is of a very limited and humble nature. As to the implied authority of a secretary, see *Barnett, Hoares & Co. v. South London Tramways Co.* (16), and *Citizens' Life Assurance Co. v. Brown* [1904] (19). The business of a company must be carried on by agents, and the plaintiffs were justified in accepting the statements made by the secretary, who represented the company in this matter: *Mahony v. East Holyford Mining Co.* (12). In *County of Gloucester Banking Co. v. Rudry-Merthyr Coal Co.* [1895] (20) it was held that mortgagees who had no other means of knowledge were entitled to regard the company as having performed their functions in the making of the mortgage by whatever means they could lawfully do so; and a similar decision was arrived at with regard to a debenture in the case of *Duck v. Tower Galvanising Co.* [1901] (21). There is no distinction in law between fraud and any other wrong with regard to the liability of a principal for the acts of his agent: *Barwick v. English Joint-Stock Bank* (5) and *In re County Life Assurance Co.* [1870] (22). Even where the act of the servant is criminal, his master is civilly responsible if it was done for the master's benefit and in the course of the servant's employment: *Dyer v. Munday* [1895] (23) and *Hamlyn v. Houston & Co.* [1902] (24). The two cases of *Bank of Ireland v. Evans's Trustees* (18) and *Merchants of the Staple of England v. Bank of England* (10) which have been cited as authorities against the plaintiffs, turn simply on the fact of a person appearing—not at the company's offices—with a document purporting to be sealed with the company's seal. They were not cases where a person goes to a company's office and is there given by the company's secretary a document bearing the company's seal. There was no estoppel in those cases: see further, *London Freehold and Leasehold Property*

(19) 20 Times L. R. 497; since reported, [1904] A. C. 423; 90 L. T. 739.

(20) 2 Manson, 223; [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486; 12 R. 183.

(21) [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847.

(22) L. R. 5 Ch. 283; 39 L. J. Ch. 471; 22 L. T. 537; 18 W. R. 390.

(23) [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276; 14 R. 306.

(24) [1903] 1 K. B. 81; 72 L. J. K. B. 72; 87 L. T. 500; 51 W. R. 99.

Co. v. Baron Sufield [1897] (25). *Shaw v. Port Philip Gold-Mining Co.* (1) was cited in *Cox, Patterson & Co. v. Bruce & Co.* [1886] (26), *Merchants of the Staple of England v. Bank of England* (10), *Balkis Consolidated Co. v. Tomkinson* (11), and *Bishop v. Balkis Consolidated Co.* [1890] (27), and has not been dissented from. That case is indistinguishable from the present one. Moreover, there is no distinction between a fraud and any other wrong committed by a servant: see *Coleman v. Riches* [1855] (28); and if the act is within the scope of his employment the master is liable: *Barwick v. English Joint-Stock Bank* (5), *Houldsworth v. City of Glasgow Bank* [1880] (29), per Lord SELBORNE, and *Citizens' Life Assurance Co. v. Brown* (19). The decision in *George Whitechurch, Limited v. Cavanagh* (9) was founded on *Grant v. Norway* [1851] (30), in which case the representation was made by the master of a ship, and therefore by a person known to be an agent whose authority was subject to well-known limitations. The same was the case in *Coleman v. Riches* (28) and in *George Whitechurch, Limited v. Cavanagh* (9), and the distinction between these cases and the present is that in the present case the certificate purports to be the representation of the company itself. In the case of a certification, the representation is made by a secretary whose authority is known to be limited; but in the case of a certificate the representation is by the company, since it bears the seal of the company and the signature of two directors: see the judgments of Lord MACNAGHTEN and Lord JAMES OF HEREFORD in *George Whitechurch, Limited v. Cavanagh* (9). The case of *Merchants of the Staple of England v. Bank of England* (10) is distinguishable on the ground of the peculiar position of the plaintiff corporation, who had no place of business and no books, whereas the defendants in the present case were constantly dealing with large numbers of certificates: see also *Bank of Ireland v. Evans's Trustees* (13).

(25) [1897] 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102.

(26) 18 Q. B. D. 147; 56 L. J. Q. B. 121; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. C. 152.

(27) 25 Q. B. D. 512; 59 L. J. Q. B. 565; 39 W. R. 99; 2 Meg. 292.

(28) 16 C. B. 104; 3 C. L. R. 795; 24 L. J. C. P. 125; 3 W. R. 453; 1 Jur. (N.S.) 596.

(29) 5 App. Cas. 317, 326; 42 L. T. 194; 28 W. R. 677.

(30) 10 C. B. 665; 20 L. J. C. P. 93; 15 Jur. 296.

[*Keighley, Marsted & Co. v. Durant* [1901] (31), *D'Arcy v. Tamar, Kit Hill, and Callington Railway* [1867] (82), and *Swift v. Winterbottom* [1873] (88), were also referred to.]

Lawson Walton, K.C., in reply :

It has never been decided that a forged certificate not made or issued by the company estops a company from denying it. The general principle is that a company can only be estopped by a statement made by the company or its equivalent. The company are not estopped by a document to which some person has given an air of validity by affixing the seal of the company : *Bishop v. Balkis Consolidated Co.* (27), *Mahony v. East Holyford Mining Co.* (12), and *Farquharson Brothers v. King & Co.* [1902] (84). *Shaw v. Port Philip Gold-Mining Co.* (1) was wrongly decided and ought not to be approved.

[*Tendring Hundred Waterworks Co. v. Jones* [1903] (35), *Dixon v. Kennaway & Co.* [1900] (86), and *Mackay v. Commercial Bank of New Brunswick* [1874] (87), were also referred to.]

July 29.

The following judgments were read :

COLLINS, M.R. : The question on this appeal is whether the appellants, a limited company, are responsible in the circumstances for the fraud and forgery of their secretary, one Rowe, who is now undergoing a sentence of penal servitude. The respondents are a firm of stockbrokers. Rowe was a member of a well-known firm carrying on business as engineers. He was also secretary of the appellant company, whose business was conducted in the office of his firm. In December, 1892, Rowe, who had frequently done business with the respondents, applied to one of their firm named

(31) [1901] A. C. 240; 70 L. J. Q. B. 662; 84 L. T. 777.

(32) L. R. 2 Ex. 158; 4 H. & C. 463; 36 L. J. Ex. 37; 14 L. T. 626; 14 W. R. 968; 12 Jur. (N.S.) 548.

(33) L. R. 8 Q. B. 244; 42 L. J. Q. B. 111; Ex. Ch., *sub nom. Swift v. Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319.

(34) [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 94.

(35) [1903] 2 Ch. 615; 73 L. J. Ch. 41; 52 W. R. 61.

(36) 7 Manson, 446; [1900] 1 Ch. 833; 69 L. J. Ch. 501; 82 L. T. 527.

(37) L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 22 W. R. 473.

Lindo to procure a loan of 20,000*l.* on the security of 5,000 shares in the appellant company, which he said were the joint property of himself and a friend in whose name they stood, and who wished to sell them, while he (Rowe) was desirous of acquiring them. The operation was to be carried out by a transfer from the friend in whose name they stood to the proposed lender, who on receiving the certificate would make the required advance. The facts and admissions are fully stated in the judgment of Mr. Justice KENNEDY, and it is not necessary for my purpose to do more than summarise them as briefly as possible.

The respondents arranged with a firm of bankers for the required loan on production of the transfer and certificate duly made out in their names. A transfer was accordingly forged by Rowe in the name of Storey to the bankers, by whom it was executed. It was then brought back by Lindo to Rowe to be exchanged for a certificate, which Rowe told him would be passed by the directors and ready for him early the next day. Lindo paid a registration fee to Rowe of 2*s.* 6*d.*, and, returning the next day at the appointed hour, received the certificate from Rowe and took it to the bank, who then advanced the money to Lindo, who paid it into his firm's bank and gave Rowe a cheque for the amount, less a deduction for commission. Throughout these transactions and until he had received the certificate and taken it to his office Lindo was unaware that Rowe was secretary, though he thought he was a director of the company. Rowe absconded. It was admitted that Rowe had forged the names of the two directors which appeared upon the certificate, and had affixed the company's seal thereto "fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage." It was also admitted that Rowe was "a proper person to deliver the certificate." On discovery of the fraud the company refused to put the bankers on the register. The respondents were, therefore, obliged to recoup the bank the sum of 20,000*l.*, and claimed in this action to recover it from the appellants on the ground that they were estopped from setting up Rowe's fraud. Mr. Justice KENNEDY, who tried the case without a jury, upon the admissions which he has set out, was of opinion that the case was indistinguishable from *Shaw v. Port Philip Gold-Mining Co.* (1), and gave judgment

for the plaintiffs. The defendants appealed. The case was very elaborately argued, and the amount at stake is large, but I think the principles on which the decision rests are well established, and, when the facts are properly understood, are easy of application.

The general rule governing the responsibility of a master for the acts of his servant was stated by the late Mr. Justice WILLES in delivering the judgment of the Exchequer Chamber in *Barwick v. English Joint-Stock Bank* (5). The passage has been frequently cited and approved, and is, indeed, the *locus classicus* on the subject. It runs as follows: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master can be proved." He then gives instances where this rule has been acted on and proceeds: "In all these cases it may be said the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Founding themselves on the principle so stated, the Court of Appeal, in *British Mutual Banking Co. v. Charnwood Forest Railway* (7) held that an action of deceit would not lie against a principal for a fraudulent misstatement made by his servant for his own private purposes in reply to a class of question which it was within his ordinary duty to answer. The fact that it was made, not in the supposed interest of the master, but for his own private purposes, *ipso facto* took it out of the scope of the actual authority, and also, according to Lord Justice BOWEN, out of the class of acts which the agent was put there to do. In *Thorne v. Heard* [1894] (38) Lord Justice KAY refers to this case, to which he was not himself a party, in these terms: "It was there deliberately decided that the words 'for his master's benefit' are essential, and that where an agent in the course of his employment committed a fraud not for his principal's benefit but for the benefit of himself, and the principal did not benefit by such fraud, he could not be made liable for it." It was also cited with approval by Lord BRAMPTON in the

(38) [1894] 1 Ch. 599, at p. 611; 63 L. J. Ch. 356, at p. 362.

House of Lords in the recent case of *George Whitechurch, Limited v. Cavanagh* [1902] (39). It was also sought, in *British Mutual Banking Co. v. Charnwood Forest Railway* (7), to fix the master with liability on the ground of estoppel by holding out the servant as the proper person to answer such questions. The two Judges, however, who dealt with that aspect of the case disposed of it on another ground, which was subsequently disapproved—namely, that a company could not be estopped from denying that which to admit would involve an *ultra vires* act: see *Balkis Consolidated Co. v. Tomkinson* [1893] (40), per Lord HERSCHELL. The case, therefore, is not a direct authority on the question whether the holding out may be of such a character as to debar the master from escaping responsibility for an act done by his servant within his apparent authority, although done not with any notion of benefiting the master, but exclusively for fraudulent purposes of his own. It is obvious that the ostensible authority may be larger than the actual, but the question will still remain whether it can ever be large enough to make the master responsible for a fraud or crime committed exclusively for the servant's own purposes, and not utilised in any way by the master.

A difficulty was raised in argument on this point. It was urged that, where the actual authority is in writing and unambiguous, and covers the actual thing done, the master is bound, though the servant misuses the authority fraudulently for his own purposes: *Hambro v. Burnand* (18), decided in this Court, following the opinions of Lord BROUGHAM, L.C., and of the Privy Council, in *Bank of Bengal v. Fagan* [1849] (41), and of a line of cases in America. Ought there then to be any difference where the authority is not in writing, but is nevertheless clearly ascertained by the verdict of a jury or otherwise upon sufficient evidence of holding out? In my opinion it is not necessary to decide this point in this case, since, for the reasons which I will presently state, I do not think the holding out here can possibly be pushed so far as to bring the fabricating the certificate, whether by writing the directors' names or by misusing the seal, within the class of acts

(39) [1902] A. C. at p. 141; 71 L. J. K. B., at p. 412.

(40) [1893] A. C. at p. 407; 63 L. J., at p. 139.

(41) 7 Moore P. C. 61.

which the secretary was apparently authorised to do. It may be, however, that a long step towards the solution of the difficulty will be found in that class of cases where the limits of what has often been called estoppel by negligence has been discussed—for instance, *Bank of Ireland v. Evans's Trustees* (42), *Northern Counties of England Fire Insurance Co. v. Whipp* [1884] (43); and for a very full discussion on the subject see Beven on Negligence in Law (2nd ed.), vol. 2, chap. 4. It is clear that a man may by his negligence, where he owes a duty, provided that negligence be sufficiently closely connected with the event to bring it within the legal chain of causality, make himself responsible to the person or class of person to whom he owes a duty for the crime or fraud of another committed for that other's own purposes. It may be that to put a written authority in the hands of another person without conditions or safeguards is such negligence as to entail responsibility to third parties for fraudulent misuse of the authority: see the instance given by Lord Justice FRY, in *Northern Counties of England Fire Insurance Co. v. Whipp* (43), of a mortgagee who allows a mortgagor to have the custody of the title deeds for the purpose of raising a loan. I cannot think that the Judges who decided *British Mutual Banking Co. v. Charnwood Forest Railway* (7) intended to deny the possibility of the principal's liability in cases of this class for the fraud or crime of his agent committed for the agent's own purposes.

However this may be, it is, I think, clear in this case that there is no evidence of such a holding out as to bring the facts done by Rowe within any presumable scope of authority. To put it most favourably for the respondents, the act, whether done for the master's benefit or not, must at least be one of the class of acts which the servant is ostensibly put there to do, so as to bring it within the second limb of Mr. Justice WILLES's proposition. If we try it by the test of actual authority, the actual scope certainly did not cover any acts other than those of a purely ministerial character, such as bringing the certificate before the directors for signature and appending the seal in their presence; and it does not need the authority of *Bank of Ireland v. Evans's Trustees* (13)

(42) 5 H. L. C., at pp. 409 *et seq.*

(43) 26 Ch. D. 482, at p. 494; 53 L. J. Ch. 629, at p. 635.

and *Merchants of the Staple of England v. Bank of England* (10) to show that fraud and forgery were not within the actual scope of such an employment. But so far as regards all this class of prior acts there is no ostensible representation at all. There is no holding out with respect to them. The ostensible action of the secretary is limited to handing over the apparently complete certificate. How does such an act carry with it any implication of authority to make as well as hand over the instrument? His own signature may import a personal representation by himself that the document is apparently genuine, and found a right against himself, but it does not import that he had any other than ministerial duties in connection with the matter. If this is so, it does not in any way enlarge the presumption if the act of handing over be often repeated, and it seems to me, therefore, that there is nothing in the point so much pressed that this was a mercantile company whose shares were constantly changing hands on the market. I think, therefore, that the representation, such as it was, based on the fact that Rowe had ostensible authority to hand over the certificates, is not more efficacious to fix the company with liability for his fraud than the representation implied in the cases cited, from the fact that the clerk or secretary was the proper intermediary through whom the forged powers of attorney were deliverable to the brokers to be handed to the banks. Those cases are, therefore, in point, and as it is not contended that there was any such negligence on the part of the company as to fix them with responsibility for Rowe's acts, I think the case against the company fails, and that we are bound to give effect to Mr. Justice KENNEDY's own view, notwithstanding *Shaw v. Port Philip Gold-Mining Co.* (1). It may be that that case is distinguishable upon its special facts, but it is not necessary to decide the point, for I am clearly of opinion that the facts in this case are not sufficient to found liability in the company. I have treated this case on the footing that Lindo dealt with Rowe as secretary of the company, and acted on the faith of the ostensible authority implied from his position as such, but I am by no means sure that this is the true inference from the evidence. An argument was founded upon some observations of the law Lords in *George Whitechurch, Limited v. Cavanagh* (9) that the certificate itself carried with it

a representation by the company which would bind them against third parties who acted upon it even though it was a forgery. But though the words used, apart from their context, might possibly be open to this construction, I think it is reasonably clear from the train of reasoning in their speeches that nothing of the kind could have been meant, and that the certificate they had in mind was one such as that in *In re Bahia and San Francisco Railway* (14), which had been in fact executed in due form by the company, but under a misapprehension. The appeal must be allowed.

STIRLING, L.J.: I entirely agree with the judgment my Lord has delivered, but it is right that I should state shortly the grounds upon which my judgment proceeds.

In this case three questions seem to require consideration. The first is this: Are the defendant company bound by the certificate on which the plaintiffs rely? The articles of association of the defendant company (of which all persons dealing with the company are deemed to have notice) provide (article 12) as follows: "The certificates of title to shares shall be issued under the seal of the company and signed by two directors, and countersigned by the secretary or some other person appointed by the directors." The document on which the plaintiffs rely is written on the company's paper, and has the seal of the company affixed and is countersigned by the secretary; it also purports to bear the signatures of two directors, but these are mere forgeries by the secretary. In these circumstances the certificate (as was, indeed, admitted by the defendants at the trial) is not a valid or genuine document, and does not, in my opinion, bind the defendants. It was suggested that, inasmuch as the document appeared on the face of it to satisfy the requirements of the articles of association, the plaintiffs, acting as they did in good faith, were not affected by irregularities in the proceedings of the secretary: *Mahony v. East Holyford Mining Co.* (12). To mere irregularities the principle of that case no doubt applies, but it has never been extended to forgery, a forged instrument being simply null and void. The distinction is drawn by Lord HATHERLEY in advising the House of Lords in the case itself (44). In that case he says: "Two cases were cited in the

(44) See L. R. 7 H. L., at p. 899.

argument in which a fraudulent use was made of the seal of a company by the secretary of a company who had been entrusted with that seal. Those cases, however, can have no bearing upon the present case, for they are simply like cases of forgery. It was just as if signatures, not a seal, had been required and the secretary had forged the names of the directors. A secretary having no authority to do so, affixed the seal of the company, and the instrument to which that seal was affixed was as void as if the question had been one of handwriting and a signature had been forged."

The second question is: Are the defendant company estopped from disputing the validity of the certificate? It was strongly urged before us that, inasmuch as the certificate was good on the face of it, and was delivered to the plaintiffs by the secretary of the company, who was admitted by the defendants to be "a proper person to deliver it," the company were precluded from denying as against the plaintiffs the validity of the document: and the decision in *Shaw v. Port Philip Gold-Mining Co.* (1), was relied upon in support of this contention. It was held in that case that the secretary had in the circumstances been held out by the company as their agent to warrant the genuineness of the certificate, and it was said that the like conclusion ought to be arrived at here. I think it is possible that a company may so act as reasonably to produce the belief on the part of members of the public dealing with the company that the secretary or other agent of the company has authority to warrant the genuineness of the certificate which he delivers, but the question whether a particular company have so acted must in each case be one of fact to be decided on the circumstances of the case. It may be well that the conclusion arrived at by the Divisional Court in *Shaw v. Port Philip Gold-Mining Co.* (1) was well founded, but the circumstances appear to me to differ from those of the case with which we have to deal. Here the articles of association prescribe that the intervention of three persons—namely, two directors and the secretary (or some other person appointed by the directors)—shall be essential to the validity of a certificate. The framers of the articles well knew that certificates were documents of great importance, as regards the preparation of which the company required to be protected; and the provisions of article 12 were directed, and must, as it seems to me, have been recognised by

business men as being directed, to the securing such protection to the company. The ministerial act of delivering the certificate when prepared to the person entitled to it must be entrusted to some one: it was, in fact, entrusted, and properly entrusted, to the secretary. But is it a proper inference of fact that the secretary was thereby held out as an agent to warrant the genuineness of the certificate? I am unable to say that it is. So to hold would, in my opinion, be to deprive the company to a very great extent of the benefit of the precautions carefully provided by article 12, and really leave the company at the mercy of the secretary or other person entrusted with the delivery of a certificate.

The third question is: Are the plaintiffs entitled to recover damages against the company for a wrongful act of the secretary committed in the course of his employment? It is said that the secretary of the company, while acting in the course of the company's business and for the company's benefit, made a representation, on the faith of which the plaintiffs acted and suffered damage, and that, although the secretary had no express authority to make the misrepresentation, still he had authority to do that class of acts, and that the company must be answerable for the manner in which he did the business which the company had entrusted to him: *Barwick v. English Joint-Stock Bank* (45).

To this there appear to me to be two answers. First, if I am right in the answer which I have given to the second question, the secretary had no authority to make representations as to the genuineness of certificates; he was merely entrusted with the ministerial duty of delivering certificates to those entitled to them. The making of such representations, therefore, was not included in the class of acts which the company entrusted to him. Secondly, the secretary, in delivering certificates, was not acting in the interest of the company, but in his own; and the case of *British Mutual Banking Co. v. Charnwood Forest Railway* (7) appears to me to be a direct authority that in these circumstances the company is not liable. It is true that part of the reasoning found in the judgments of Lord Justice BOWEN and Lord Justice FRY has been disapproved by the House of Lords in *Balkis Consolidated Co. v. Tomkinson* (46);

(45) L. R. 2 Ex., at pp. 265, 266; 36 L. J. Ex., at p. 149.

(46) [1893] A. C., at p. 407; 63 L. J. Q. B., at p. 139.

but the decision has never been overruled, and in fact was cited as an authority by Lord BRAMPTON in the recent case of *George Whitechurch, Limited v. Cavanagh* (47). In my opinion, therefore, it is binding on this Court. For these reasons I think that the appeal ought to be allowed, and judgment entered for the defendants.

MATHEW, L.J.: This is an appeal from the judgment of Mr. Justice KENNEDY in an action brought to recover damages for the refusal of the defendant company to place the names of the nominees of the plaintiffs upon the register of shareholders. The plaintiffs rely upon a share certificate received by them from the secretary of the defendant company, which apparently was in proper order and issued in accordance with the company's articles of association. It was contended that the company were estopped from disputing the certificate as against the plaintiffs, who had, on the faith of it, incurred liability to Lazard Bros. & Co. for a loan of 20,000*l.* The defendants contended that they were not bound by a certificate which was a forgery and which was shown to have been issued by the secretary to raise money, not for the company, but for his own purposes. It was not disputed that it was for the benefit of the company that provision should be made for the ready transfer of shares, and that the company followed the usual course in providing for that purpose a transfer department, which was in charge of a principal clerk and a clerical staff. When a transfer was sent to the company the duty of the transfer clerks was to see that the document was in order, ascertain that the shares stood in the name of the proposed transferor, and to issue a certification. The matter was then referred to the auditors, whose duty it was to see that the old certifications were cancelled. When this was done the share certificate was filled up and taken to the secretary's office on the morning of a board meeting, to be submitted to the board. The secretary had no duty to supervise what had been done in the transfer department. He was not always present at the board meetings, and it appeared that the certificates were usually brought to the board by one of the transfer clerks. The directors had the opportunity of making inquiries,

(47) [1902] A. C., at p. 141; 71 L. J. K. B., at p. 412.

and in a case of this magnitude it would be a neglect of their duty if they did not ask for information or adopt the precaution of comparing the proposed certificate with the share list. When the certificate passed the board, the directors signed in accordance with the articles of association. The seal was affixed by the secretary or a director and countersigned by the former, and the certificate was left with him to be handed to the transferee. This was a ministerial act only, and might be performed by any trustworthy messenger. It seems clear that the defendant company were bound to take precautions to prevent their being made liable, as in *In re Bahia and San Francisco Railway* (14), for forged or fraudulent transfers, and these regulations as to the conduct of the transfer business would seem to be sufficient for their protection.

It now becomes important to inquire into the transaction between the plaintiffs and Rowe in order to determine whether the estoppel upon which the plaintiffs relied was established—in other words, whether the company had lost the protection against fraud which their regulations were intended to secure. Rowe was a partner in the firm of Bewick, Moreing & Co., who were the promoters of this and several other companies. He held the appointment under an agreement of 31 December, 1900, whereby Bewick, Moreing & Co. undertook to provide the defendant company with suitable offices, a suitable secretary, and a sufficient clerical staff. The secretary was to be paid by Bewick, Moreing & Co., but was to be deemed to be the secretary of the defendant company. The plaintiffs were stockbrokers with whom Rowe had done business on his own account. They did not know that he was secretary to the company. They believed him to be a director. Rowe was in good credit, and the plaintiffs had entire confidence in him. In December Rowe saw Lindo and asked whether the plaintiffs could arrange a loan for 20,000*l.* for him on 5,000 shares in the defendant company. He stated that he had a joint interest with a friend who wished to sell, and he desired to take over the shares because he believed they would rise considerably in value. He wanted a loan for a short time only, and as the 5,000 shares at the then price were ample security for 20,000*l.* the plaintiffs agreed to try to find the money. The plaintiffs arranged with Lazard Bros. & Co., who are bankers, for the advance of 20,000*l.* to themselves

on the proposed security, and Lindo on the same day informed Rowe that the money would be ready on 18 December. Rowe said that he would at once have the share transfer executed. On 17 December a transfer in blank was taken by Lindo to Rowe, and later in the day was returned by Rowe and purported to have been executed by E. Storey. This document was forged by Rowe. On the transfer appeared the usual certification. Rowe told Lindo that his directors would be meeting the next day, and that he would explain the transaction to them and would have the share certificate made out ready for Lindo at 11.30 next morning. It is important to notice that Lindo was in this way informed that the transfer must have the sanction of the board. The same afternoon Lindo brought back the transfer executed by the transferees. The next day Rowe delivered to Lindo the share certificate. It was perfectly regular in form, and purported, in accordance with the articles of association, to bear the seal of the company, to be signed by two directors, and to be countersigned by Rowe as secretary. Lindo did not notice until he got back to his office that Rowe was the company's secretary. It seems clear that up to this point Lindo dealt with Rowe in his personal and not in his official capacity. As he stated in giving his evidence, he looked upon the loan as Rowe's private business. He supposed him to have authority to transfer shares, and assumed, when the certificate was handed to him, that Rowe had taken the proper steps to carry the transaction through. The share certificate was handed to Lazard Bros. & Co. The money was advanced to the plaintiffs and paid to Rowe. Within a few days Rowe absconded, and it was discovered that the certificate was a forgery. Lazard Bros. & Co. applied to the defendant company for the registration of their nominees as the owners of the shares. This application was refused, and the plaintiffs were compelled to pay Lazard Bros. & Co. the amount of the loan with interest. They then brought the present action. In the argument much reliance was placed by counsel for the plaintiffs on the admission 2 (b), that the secretary was a proper person to deliver the certificate. But this guarded concession on the part of the defendant company does not displace and is not inconsistent with the course of business followed by the company.

In these circumstances, it seems to me there was no estoppel. There was no evidence that Rowe was held out or dealt with as the officer of the company who was empowered to represent to those who dealt in the shares of the company that a transfer was genuine and valid. The company, it seems to me, were no more liable in respect of the forged certificate than they would be upon a verbal statement to the plaintiffs that Storey could transfer the shares. There was no evidence that it was part of the business which Rowe was appointed to transact for the company to make any such representation. I am of opinion that the action fails, and the loss must rest where it has fallen. The plaintiffs, and not the Fingall Co., are the victims of Rowe's dishonesty.

In the view which I take of the facts, it is unnecessary to comment upon the cases cited in the course of the argument. With respect to the case of *Shaw v. Port Philip Gold-Mining Co.* (1), I wish to point out that the judgment proceeded upon the description in the special case of "the regular and authorised duty" of the secretary. The statements upon this subject were regarded as amounting to an admission that his fraudulent acts were within the scope of his authority. It was argued for the defendants that, even if this were so, the defendants were not liable, because the fraud had been committed by means of a forgery. No distinction between frauds by forgery and frauds by any other means is to be found in the judgment in *Barwick v. English Joint-Stock Bank* (5). It was contended for the defendants that *Shaw v. Port Philip Gold-Mining Co.* (1) had been overruled by *British Mutual Banking Co. v. Charnwood Forest Railway* (7). But, with great deference to the eminent Judges who decided that case, it seems to me the judgment is not available as an authority for the defendants. Their Lordships did not agree as to the grounds for allowing the appeal. It is not easy to reconcile the judgment of Lord *ESHER* with *Barwick v. English Joint-Stock Bank* (5), and Lord Justice *BOWEN* and Lord Justice *FRY* base their judgments on the ground that a corporate body cannot be prevented by estoppel from denying that they had done what was beyond their powers to do. But this reasoning was not approved of in *Balkis Consolidated Co. v. Tomkinson* (11). The case of *George Whitechurch*,

Limited v. Caranagh (9), related to an authorised certification and not to a forged certificate.

Appeal allowed.

Solicitors: *Gilbert, Samuel & Co.*, for the Plaintiffs.

Ashurst, Morris, Crisp & Co., for the Defendants.

IN RE JOHNSTON FOREIGN PATENTS CO., LIMITED,
 IN RE JOHNSTON DIE PRESS CO., LIMITED,
 IN RE JOHNSTONIA ENGRAVING CO., LIMITED,
 J. P. TRUST, LIMITED v. THE COMPANIES.

1904, June 20, 21. C. A. VAUGHAN WILLIAMS, ROMER AND COZENS-
 HARDY, L.JJ.

Company—Debenture—Validity—Issue of Debentures by Companies Jointly and Severally—Charge on Several Undertakings of the Companies—Proceeds Divided between Companies—Articles of Association—Construction—Power to Borrow Money not exceeding Amount of Preference Share Capital.

Three companies, each of which had general power to borrow on mortgage or debentures, issued twenty-five mortgage debentures for 1,000l. each. The debentures were headed in the names of the three companies, and were stated to be an issue by the companies jointly. The three companies thereby jointly and severally agreed to pay to the debenture-holders the principal sum and interest, and they thereby charged with such payments their several undertakings and all their present and future properties and assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three companies, who were in each case the same persons, and the moneys advanced were paid to a joint banking account, and were appropriated in different amounts to each company. Orders had been made for the winding-up of each company, and the debenture-holders had brought an action to enforce their security:—

Held, that having regard to the several obligations of the companies respectively, assuming it was *ultra vires* the companies to issue debentures jointly, the debentures were a valid charge against each company to the extent to which the money advanced came to the coffers of that company.

The articles of one of the companies gave the directors various powers, in addition to their general powers, and in particular power to borrow on the security of the property of the company "any sum or sums of money not exceeding the amount of the preference share capital of the company":—

Held, that this was not a prohibition of borrowing unless and until preference shares had been issued, but was intended for the protection of the preference shareholders if they existed, and until they came into existence the company could borrow under its general powers without regard to this limitation.

THIS was an appeal from a decision of BYRNE, J.

The question was as to the validity of certain debentures issued by the above three companies, purporting to be debentures given jointly and severally by the companies.

The companies were all companies incorporated under the Companies Act, 1862, and the amending Acts. The memorandum and articles of association of each company contained powers for

the company and directors to raise and borrow money by way of mortgage debentures or other security. The articles of association of the Johnston Foreign Patents Co. gave various powers to the directors, and in article 114 gave certain particular powers, amongst which was in Clause D. power for the directors to borrow, or raise, or secure any sum or sums of money not exceeding the amount of the preference share capital of the company, on the security of the property of the company (including uncalled capital, if any), or any part thereof, either by way of mortgage, with or without power of sale, or of debentures or debenture stock or other security, or without security, and upon such terms as to payment, interest, or redemption, or otherwise as they might think fit, and out of the assets of the company redeem and pay such securities and loans, and in connection therewith to make such arrangements as might be deemed expedient for vesting any property of the company in trustees, or otherwise for the benefit and security of the holders of such debentures.

At the dates when the transactions in question took place the three companies were closely connected. The same persons were directors of all three companies, and the companies had the same secretary, and occupied the same offices. The three companies were all promoted and controlled by J. Y. Johnston, and were practically financed by him. In December, 1901, all the three companies were in want of money, and on 28 December, 1901, a meeting of the board of each company was held, at which it was resolved in conjunction with the other two companies, "to create and issue 25 mortgage debentures of 1,000*l.* each, to be secured upon the joint property and assets, undertakings and businesses of the three companies, to be payable on or before the 30th day of July, 1903, with a bonus of 50*l.* on each 1,000*l.*," and that the debentures should be in the form submitted to the meeting. On 2 January, 1902, board meetings of each of the three companies were held, at which a resolution was passed "that all moneys received from the issue of debentures recently authorised shall be paid into a special banking account to be opened with the London City and Midland Bank, to be called the 'Johnston Companies Debenture Account.' That from time to time as occasion arises the three companies shall be financed from the said account, but that every payment

thereout shall be sanctioned in writing by a committee [naming them], and that all cheques on the account shall be signed by any two members of the board of the three companies as at present constituted and countersigned by the secretary."

Each of the debentures was headed in the names of, and given under the common seal of the three companies, and was in the following form: "Issue by the above named companies jointly of 25 first mortgage debentures of 1,000*l.* each. Redeemable on or before 30th June, 1902, at 1,050*l.* per debenture and carrying interest meantime at the rate of 6*l.* p.c. per annum. The three above named companies (hereinafter called the companies) jointly and severally agree to pay to . . . of . . . to whom this debenture is issued or other the registered holder or holders for the time being hereof (all of whom are intended to be included in the expression 'the debenture-holder' when used herein) the principal sum of 1,000*l.* together with a bonus of 50*l.* and also interest in the meantime at the rate of 6*l.* p.c. p.a. on the 30th day of June, 1902, or on such earlier day as the said several moneys may become payable in accordance with the conditions subscribed hereto. And the said three companies hereby respectively charge with such payments their several undertakings and all their present and future properties and assets. And it is hereby declared that this debenture is issued upon and subject to the conditions subscribed hereto which are to be deemed to be incorporated herein."

Condition 3 was as follows: "The charge hereby created shall be a floating charge and accordingly the companies shall be at liberty in the course of their businesses and for the purpose of continuing and carrying on the same, and the *bonâ fide* prosecution and conduct of their undertakings and businesses or any part thereof, to use, employ, sell, mortgage, charge, lease, exchange, or otherwise deal with or dispose of all or any part of their property for the time being which may require to be so used, employed, dealt with, or disposed of, but so that the companies shall not have power to create any mortgage or charge ranking *pari passu* with or in priority to the said debentures."

The moneys secured by the debenture were to become immediately payable on (*inter alia*) an order or resolution for the winding-up of either of the companies, or any process of execution or

distress levied on any property thereby charged unless such process was satisfied within three days from the date of levy.

Debentures of the three companies were issued to the amount of 25,000*l.* They were issued substantially at the same time, and the proceeds of the issue, together with 1,000*l.* advanced by one Hadrill on the security of a debenture issued by the Johnston Foreign Patents Co., were paid into the banking account as provided by the resolutions, and were appropriated by the three companies as follows: 15,024*l.* 15*s.* to the Johnston Foreign Patents Co., 6,943*l.* to the Johnston Die Press Co., and 2,815*l.* to the Johnstonia Engraving Co., the balance being absorbed by commission and expenses and repayments of former loans.

At the time of the issue of the debentures there was no preference share capital of the Johnston Foreign Patents Co.

Orders had been made for the compulsory winding-up of all the three companies in May, April, and July, 1902, respectively. Prior to the winding-up orders one of the debentures had been transferred to the J. P. Trust, Limited, and they and Hadrill, who held six of the debentures, brought the action to enforce their security, and an order had been made in that action for the appointment of a receiver.

The Official Receiver and liquidator of the three companies took out a summons for a declaration that the debentures purporting to be issued by the companies and held by the J. P. Trust and Hadrill were respectively invalid and void and *ultra vires* the companies and each of them, and created no charge upon the assets of the companies or any of them; and an order that the debentures should be delivered up to him to be cancelled.

BYRNE, J., on 2 February, 1904, made an order as asked by the summons. He was of opinion that, as regards the Johnston Foreign Patents Co., the directors were not acting within their powers in joining in the issue of the debentures, by reason of there being at the time no preference share capital of the company; and, as regards all the companies, that the general power of borrowing given to the companies respectively did not authorise the joining with other companies in borrowing money to be charged upon the whole of the undertakings of the three companies.

The J. P. Trust appealed.

· *Upjohn, K.C.*, and *Beddall*, for the appellants:

Article 114 of the articles of association of the Foreign Patents Co. does not restrain the power of the company—it is only a restriction on the directors' powers. The objects of these companies, as stated in their memorandums of association, are very wide, and are sufficient to authorise joint borrowing by the companies, notwithstanding that the Court in some cases has refused to construe very wide powers given to a company literally: *Stephens v. Mysore Reefs (Kangundy) Mining Co.* [1902] (1) and *In re German Date Coffee Co.* [1882] (2). The memorandums enable the companies to assist one another. The issue of debentures, therefore, was not *ultra vires*.

[ROMER, L.J.: Can companies which have no joint property borrow jointly without express power?]

The principle on which the Court acts is to construe documents so as to carry out as far as possible the intention of the parties: *Roe d. Wilkinson v. Tranmer* [1758] (3) and *In re Strand Music Hall Co.* [1865] (4).

[ROMER, L.J.: Is it not really a question of agency? *Hawksley v. Outram* [1892] (5).]

There is nothing illegal in companies which have power to borrow exercising their powers in this way. The charge binds the property of each company to the extent to which the company has received the money raised. The debentures are valid to that extent against each company: *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* [1882] (6).

(1) 9 Manson, 199; [1902] 1 Ch. 745; 71 L. J. Ch. 295; 86 L. T. 221; 50 W. R. 509.

(2) 20 Ch. D. 169; 51 L. J. Ch. 564; 46 L. T. 327; 30 W. R. 717.

(3) 2 Wils. 75, 78; Willes, 682, 684.

(4) 3 De G. J. & S. 147; 13 L. T. 177; 14 W. R. 6.

(5) [1892] 3 Ch. 359; 61 L. J. Ch. 429; 62 L. J. Ch. 215; 67 L. T. 804.

(6) 22 Ch. D. 61; 52 L. J. Ch. 92; 48 L. T. 33; 31 W. R. 98: affirmed, *sub nom. Cunliffe, Brooks & Co. v. Blackburn Benefit Building Society*, (1884) 9 App. Cas. 857; 54 L. J. Ch. 376; 52 L. T. 225; 33 W. R. 309.

[VAUGHAN WILLIAMS, L.J., referred to *In re Cork and Youghal Railway* [1869] (7).]

Buckmaster, K.C., and E. A. Nepean, for the liquidator :

The borrowing powers of the Johnston Foreign Patents Co. depends on the amount of the preference share capital; and as there was no such capital at the time of the issue of these debentures, that company, at any rate, had no power to borrow.

Apart from that, the question whether or no the debentures are valid must depend upon the purpose for which they were issued, and if they were not valid at the time of issue they cannot be afterwards made valid by the purpose to which the money was applied. In each case it was not proposed to borrow for the purposes of the particular company in question, but for the purposes of the other two companies as well, and that was beyond the powers of the company.

[COZENS-HARDY, L.J., referred to *In re Wrexham, Mold, and Connah's Quay Railway* [1899] (8).]

The Court will, no doubt, where a man has advanced his money in good faith, perfect his security so far as possible where it is informal, but the persons who advanced their money in this case must in the circumstances have known what they were doing. There was really no debt. A title cannot be made through a breach of trust, and directors are in the position of trustees as regards their powers. *In re Lands Allotment Co.* [1894] (9), *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* (6), and *Baroness Wenlock v. River Dee Co.* [1887] (10) are not in favour of the appellants.

VAUGHAN WILLIAMS, L.J.: I will deal first with the point made on article 114 in the articles of association of the Johnston Foreign

(7) L. R. 4 Ch. 748; 39 L. J. Ch. 277; 21 L. T. 735.

(8) 6 Manson, 218; [1899] 1 Ch. 440, 462; 68 L. J. Ch. 270, 280; 80 L. T. 130; 47 W. R. 464.

(9) 1 Manson, 107; [1894] 1 Ch. 616; 63 L. J. Ch. 291; 70 L. T. 286; 42 W. R. 404; 7 R. 115.

(10) 19 Q. B. D. 165; 56 L. J. Q. B. 589; 57 L. T. 320; 35 W. R. 822.

Patents Co., which really overrides the other question upon the debentures. It is said that this particular company had no right to issue debentures at all, by reason of Clause D. of this article 114, inasmuch as at the time of the issue of these debentures no preference share capital whatsoever had been issued by the company, and that the true meaning of this clause is that unless and until there is an issue of preference share capital the company is not to exercise its borrowing power, and that when there is such an issue of preference share capital then the power of borrowing is only to be exercised to the extent of an amount of money not exceeding the amount of the preference share capital. If that were so, it would certainly make the debentures issued by the Johnston Foreign Patents Co. *ultra vires* and altogether bad; but I do not agree in that construction. Before I say what I think the true construction is, I will call attention to the earlier part of this article. It provides, at the end of the preface, that "the directors may do all acts and things which they shall consider proper or advantageous for accomplishing the objects or carrying on the business of the company, and may in particular, but without derogating from the generality of the foregoing powers, exercise the following powers." And if one turns to the articles of association of this company one finds that there is a power expressly given to borrow and raise money. I think we must construe this Clause D. in the light of those words, and in the light also of the memorandum giving the power to borrow money and raise money. This clause is a clause which is, in form at all events, provided to take effect without derogation from the generality of the foregoing powers, and in my opinion it ought not to receive the construction that it is an absolute prohibition of borrowing unless and until preference shares have been issued. In my judgment the clause is really introduced for the benefit and protection of the preference shareholders, and unless and until there are preference shareholders this protection is not wanted. I think that the business understanding of the clause would be that debentures may be issued under the general powers that are given, with no limit at all excepting the express limits that are found in the earlier part of the articles and memorandum; but as soon as preference share capital is issued the company will not be allowed to issue debentures beyond the amount of the preference share capital,

because, unless the company holds out that sort of security to the public whom they invite to come in as preference shareholders, nobody would come in at all. What it means is that the company may avail itself of its powers to raise capital by debentures, and do that freely (that is a fact that will be known to all the world), but if it proposes in addition to that to use the inferior security of preference shares as a means of raising capital, then from that time forward it is not to issue debentures exceeding the amount of the preference share capital. I think, therefore, that this point fails.

I will now go on to say what I gather from the form of the debentures and from the evidence as to the circumstances under which they were issued. I have no doubt myself that these three companies were each of them in want of money, and in want of money for purposes which I am entitled to assume, in the absence of any suggestion by the liquidator that the moneys were otherwise spent, were in fact *intra vires*. They had debts and liabilities, and they desired to discharge them. Johnston had been in the habit of lending money to each one of them, and, being pressed with these liabilities, they applied to Johnston, but he was not in a position to make the advances which the companies heretofore had got from him. Thereupon it was suggested that money might be raised to meet the liabilities of each of these companies by the issue of debentures. There was a difficulty about the issuing of debentures by each of the companies in respect of a separate advance to them, because at the moment when that was proposed to be done there was considerable uncertainty both as to the liabilities of the respective companies and also as to the property which belonged to each one of them, their properties having been very much intermixed. Thereupon it occurred to the legal adviser of the three companies that it would be a very good plan if, instead of having three sets of debentures issued by the respective companies, they had one set of debentures issued by the companies jointly. Under those circumstances, my conclusion, in fact, is that the ultimate object which was in view by these three companies was the raising by each of them of a sum of money sufficient to meet the financial wants of each company, but that as a matter of machinery it was thought better that this security should be given in this form. Under those circumstances these debentures were issued, and I may mention that ascertained sums of money

from the proceeds of these debentures, varying in amount from something over 15,000*l.* to something under 3,000*l.*, came into the coffers of these companies respectively.

The ultimate result of all this is that each one of these companies got into its coffers from the pockets of the persons to whom the debentures were issued a sum of money; and the money advanced, in my judgment, ought to be treated as if it had been advanced rateably by each of these lenders to these companies in such a way that if any one of the three companies was an insolvent company, the amount which was advanced by each individual debenture-holder would be treated as being divided rateably between the two solvent companies and the insolvent company. I am not aware whether in fact there was any difference in the solvency of the companies, but I can see no difficulty in doing justice in that manner. If the debentures were 100*l.* debentures, and one of the companies was insolvent, each one of the holders of these debentures would be treated as having advanced 33*l.* 6*s.* 8*d.* to each of the solvent companies, and 33*l.* 6*s.* 8*d.* to the insolvent company. I am saying this to show that the ultimate result was an advance by each of these debenture-holders to each company to the extent that his money went into the coffers of the company.

It is said that either we ought to treat these debenture-holders as not being creditors at all of the company, or, that if we do not treat them as creditors, we ought to treat them as unsecured creditors. It seems to me that in this state of facts it is impossible for us to say that we ought not to treat these debenture-holders as creditors of the companies. Upon the face of each debenture there is an admission of a debt of 1,000*l.* That may not be, and will not be, the right amount in respect of each company; but it seems to me that, however much the machinery may have been misconceived, if that is the proper word to use, there still is, to the extent of the moneys that each debenture-holder found for each company, a debt by that company to him. Assuming that there is a debt, the next question is whether these creditors who have advanced these moneys to these companies respectively are to come in with the unsecured creditors and rank against the assets *pari passu*, or whether the debentures give them a security. We will look at the form of the debenture and see what the objections to it are. I will assume for the purpose

of my present judgment that for these companies to issue debentures jointly was *ultra vires*. I am not deciding the question to-day, and I do not wish to be understood as saying that, in my opinion, in all cases where companies for trading purposes, whether the purchase of goods or the raising of money, enter into such a transaction, it would be necessarily *ultra vires*. I think it must depend upon the circumstances of each case. I am happy to say I have not to decide that, and I am only dealing with this case upon the basis that this issue by companies jointly of these debentures was *ultra vires*. Then the covenant to pay is a joint and several covenant. If there had been the several covenant alone, nobody could have said that the debenture was *quâ* that several covenant void, but it is suggested that it is void because the several covenant is accompanied by the joint covenant. Then the three companies thereby respectively charge with the payment of the money their several undertakings and all their present and future properties and assets. The objection to that is that the companies there are charging their assets with moneys which are not coming into their coffers, and which in the circumstances which I have mentioned it is plain were intended, to a certain extent, to go into the pockets of the other companies. The conditions are set out, but I do not know that they affect anything that was done here. As a joint debenture this document, I am assuming, is bad; but does that make it a totally void security? The companies each of them had a power to borrow money to the extent that these moneys actually came to their coffers, and for the purpose for which these moneys were intended to be used, and were in fact used, and I do not think that I am bound to say that because this debenture mortgage is void and *ultra vires* in so far as it makes each one of these three companies charge its property for, and contract to pay the debts of, the other two companies, yet it may not stand good to the extent that it gives security for the separate debt which might be incurred and secured by those companies respectively for the purpose of their own business. When one bears in mind the undoubted fact that the money advanced on these debentures has gone into the pockets of these companies respectively, and has come from these debenture-holders, and has in each case been used by the company for its benefit for proper purposes, and been used in such a way as to increase the assets of the company, I do not think that we ought to refuse to

give effect to the debentures in so far as they create a security for sums which were borrowed within the powers of these companies respectively. I do not think that these sums were any the less borrowed by these companies *intra vires* because at the moment that they gave these debentures they intended to make themselves responsible also for sums of money for which they could not, without doing something that was *ultra vires*, incur a responsibility. Under those circumstances, although the companies undoubtedly purport on the face of the debentures to do things which for the purpose of my present judgment I am holding to be *ultra vires*, yet I think that we ought to hold that these debentures stand good as a security for those moneys which have come from the pockets of the debenture-holders and have been received and enjoyed by the companies respectively.

I do not propose to go at any length into the authorities, but I think the principle is very well stated in the judgment of Chief Justice WILLES in *Roe d. Wilkinson v. Tranmer* (8). That was a case in which a conveyance was intended to operate by way of release; but it could not do so, and the Court, gathering the obvious intention of the parties so far as the form of the document was concerned, sought to justify itself in carrying out their real intention by treating the release as operating as a covenant to stand seised. In this passage the CHIEF JUSTICE, giving the judgment of the Court, says: "Lord Hobart (who was a very great man) in his reports, fo. 277, says 'I exceedingly commend the Judges that are curious and almost subtil, *astuti*, to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act'; and my Lord HALE, in the case of *Crossing v. Scudamore* [1670] (11), cites and approves of this passage in Hobart." I think here that, although the machinery was wrong, being in part something beyond the powers of the companies, we ought to prevent injustice by holding that the security is a good security in so far as the moneys of the debenture-holders have come into the coffers of each company for purposes which were *intra vires*, and have been so employed. A suggestion was made as to an inquiry to see how far the moneys had been so employed, but unless some such inquiry is asked for I think we ought to assume that the moneys have been so employed.

(11) 1 Vent. 137, 141.

Under those circumstances, I think that this appeal ought to be allowed.

ROMER, L.J.: I have come to the same conclusion. With regard to the point upon the construction of clause D. in article 114 of the articles of association of the Foreign Patents Co., it is clear that *primâ facie* that was intended to confer a power, and not to cut down any previously existing powers belonging to the directors. I notice that in article 114, before the particular powers are specified, it is expressly provided that these powers should be conferred without derogating from the generality of the foregoing powers which are mentioned in the article. It must be remarked that clause D. is not negative in form. It is positive in form so far as it purports to confer a power. No doubt it may imply a negative too, but what the implication is is a question to be determined by a consideration of the wording of the clause and the circumstances of the case. I think that, so far as an implication is to be drawn from clause D., it ought not to be an implication that until preference shares are issued there shall be no borrowing powers given to the company at all. I think that such a construction would lead to the greatest possible inconvenience, and would not be reasonable under the circumstances, and that it would not be justified by the wording of the clause. I think that the clause really implies only a restriction when preference share capital exists. I do not think it was directed to the case of there being no preference share capital at all; and I cannot help thinking, though this may be a matter of speculation, that the real intention of the clause was to restrict the borrowing in favour of existing preference shareholders, so that they should not have their security cut down by persons with a higher right being put before them without their consent and approbation. At any rate, I cannot myself come to the conclusion that as a question of the construction of clause D. it is to be inferred that when there is no preference share capital existing there is no power to borrow at all. On the contrary, I think the general power exists, and therefore, so far as this point is concerned, the appellants are right.

That brings me to the main point. I will assume—and indeed it must not be inferred from anything I say that I differ from what Mr. Justice BYRNE has decided—that, so far as these debentures

purported as a matter of substance to make each company pledge its credit and assets for money not coming to the company itself, but to the other companies also, they were *ultra vires*; and I think the transaction must be taken, to say the least of it, to have been irregular so far as the companies purported to contract jointly, and so far as the moneys raised were carried to a joint account and not paid direct in proportions to the several companies. But the transaction was an honest transaction. It is not a case where there has been fraud. Money in cash has been honestly advanced, and has come in certain shares into the pockets, if I may use the expression, of each of these three companies; and I think that under those circumstances, so far as each company obtained its proportion of the moneys that were borrowed, the Court ought, if possible, to support the transaction as against that company in so far as the Court can legitimately do so.

I think in this case the Court can and ought to uphold the debentures as against each company to the extent to which the money borrowed came into the coffers of that company. I may point out that there is nothing on the face of the debenture which renders it impossible for us to make it effectual to the extent which I have indicated. It is not as if on the face of it there were merely a joint liability imposed upon the three companies. Each company undertakes and agrees to pay the whole debt, and each company charges its own assets with the payment of the whole debt. Therefore, so far as the form of the debentures is concerned, although the joint covenant may be treated as bad and as non-existent, yet there is nothing to prevent the covenant of each company to pay the debt being enforceable merely because the amount of the debt may exceed the amount actually coming to that company. It is not impossible, therefore, to say that each company may, even on the face of the debenture, be at any rate liable for so much of the amount covenanted to be paid as came to that company; and, of course, no difficulty arises on the form of the debenture from the fact of the charge being given, for it is a charge for the whole debt, and therefore clearly a charge for the lesser amount. The question, therefore, works down to this: What in substance was the transaction, and can it in substance not be held good to the extent to which the moneys

borrowed from the lenders came to the coffers of each company? I take the transaction to be in substance this: Each company wanted the money for its own purposes, but they each had the same governing body, and erroneously it was thought that they could raise the money wanted for the three companies in a lump sum and subsequently divide it amongst them, after carrying the moneys to a joint account, when it was ascertained exactly how much each company wanted for its particular purposes. So far, therefore, as each company got from that machinery money for its own purposes, and used it for its purposes, that company, while purporting to borrow that money and to make itself liable for more money, did at any rate borrow that amount and make itself liable for that amount. I agree that the machinery was wrong, that the joint covenant was inoperative, and the joint account was as a piece of machinery irregular, but still each company did intend to borrow money which would come to itself, and which did come to itself; and so far as that is concerned I think that each company may be said to have borrowed that amount, and that the amount so borrowed was within its powers. As I have already pointed out, there is no objection to giving the transaction validity, and on the face of the debentures themselves, and so far as the substance is concerned, I think that it ought to be and can be supported so far as the money raised actually came to the coffers of each company.

Under those circumstances, I agree that, to the extent which I have indicated, these debentures ought to be upheld, and that in substance the appeal may be said to have been successful.

COZENS-HARDY, L.J.: I am of the same opinion. I do not propose to add a word as to the construction of article 114 of the articles of association of the Foreign Patents Co.

With reference to the point of law which has been argued, speaking for myself, I entirely agree with what Mr. Justice BYRNE said in his judgment, that a general power to borrow given to a company and exercisable by the company under the terms which are to be found in the present case, does not authorise the company joining with other companies in the borrowing of a sum of money which is to be jointly borrowed and charged upon the whole of the

undertakings of the three companies. It is upon that assumption that I approach the consideration of this debenture; but when I do that I cannot shut my eyes to this—that the real intention and object was that each of the three companies should have a portion thereafter to be ascertained of the 25,000*l.* to be advanced by the debenture-holders. In that there was no illegality. Now, suppose there had been three separate debentures each for 25,000*l.*, one given by each of the companies. In that case it would have been plain that each debenture could only have ranked and been said to be good, not for the whole 25,000*l.* but only for the amount which was actually received by the particular company from the 25,000*l.*, and which ultimately got into the coffers of that company. Is there any difficulty in our giving the like effect to this debenture? It is muddled in form, I agree, but it contains a separate covenant by each of the companies and a separate charge upon the assets of each of the companies. It seems to me that even in substance, regard being had to the honesty of the whole transaction, we ought not to deprive these debenture-holders of their security, but ought to say that the debentures are a valid security by each of the three companies upon its own assets to the extent to which such company has received any part of the 25,000*l.* If necessary, there may be an inquiry.

Appeal allowed, and declaration made that the debentures, in so far as they purported to effect a joint borrowing by the three companies, were ultra vires and void, but the respective debenture-holders were entitled to hold the debentures as a valid charge against each company to the extent to which the money advanced reached that company or came to its coffers, the notice of appeal being treated as amended so as to make the appeal an appeal by both plaintiffs.

Solicitors: *Pakeman & Read*, for the Appellants.

Blundell, Gordon & Co., for the Liquidator.

PULSFORD v. DEVENISH.

1908, August 6, 7. FARWELL, J.

*Company—Winding-up—Liquidator—Statutory Duty to Pay Debts—Dissolution—
—Negligence—Unpaid Creditor—Liability of Liquidator—Companies Act,
1862, ss. 133 and 138—Companies Act, 1900, s. 25.*

It is the duty of a liquidator before distributing the assets of a company not only to advertise for creditors but also to write to those creditors of whose existence he knows and who have not sent in claims, and ask them if they have any claims against the company.

The duty imposed on a liquidator of paying the debts of the company is an absolute statutory duty without limit in point of time and with no provisions for the release of the voluntary liquidator. So long as the company remains in existence the creditors and contributories have a remedy, and can apply to the Court in the winding-up to assert their rights; but when the company has been dissolved, and the statutory remedy is therefore gone, the statutory duty still remains, and the liquidator is personally liable at law for a breach of that duty.

Knowles v. Scott (1) distinguished.

WITNESS action.

By an agreement in writing, dated 2 March, 1900, and made between the plaintiff, Emile Pulsford, as administrative agent for the plaintiff Société Centrale d'Electricité et de Lampes à Incandescence (a *société anonyme* incorporated in France in accordance with French law, hereinafter called "the plaintiff *société*") of the one part, and the Hiram S. Maxim Electrical Corporation, Limited (below called "the licensees") of the other part, it was agreed that, in consideration of the payments therein mentioned, the licensees should, as from the date thereof, have the grant from the plaintiff *société* as beneficial owners of a licence to make, use, and exercise a certain invention during the unexpired residue of the term of the letters-patent in respect thereof, or any renewal or extension thereof, and the full benefit thereof and of all improvements; as consideration for such licence the licensees should pay to the plaintiff *société* the sum of 300*l.* per annum as rent for a term of eight years from the date of the agreement, the payment in respect of the years 1900 and 1901 to be made on the signing thereof, and the next payment to be made on 1 March, 1902, and the subsequent annual payments to be made on 1 March in each succeeding year; that the said agreement

(1) [1891] 1 Ch. 717; 60 L. J. Ch. 284; 64 L. T. 135; 39 W. R. 523.

should be deemed to be a contract made in England and should be governed and construed according to the laws of England.

The defendant Pulsford was a director of the licensee company, and negotiated this agreement with plaintiffs; and as director he was a party to affixing the seal of the company to the agreement in the usual way, and paid the plaintiff *société* for the licence for 1900 and 1901 600*l.* on signing the agreement.

In April and May, 1900, the plaintiffs sold and delivered to the licensees 5,000 lamps of a value of 124*l.* 2*s.* 6*d.*, but this sum was not paid by the licensees. The defendant, however, did not know of this claim of the plaintiffs.

By an agreement in writing of 22 January, 1901, between the licensees and the Maxim Electrical and Engineering Co., Limited (afterwards renamed the Sir Hiram Maxim Electrical and Engineering Co., Limited, and hereinafter called "the new company"), the licensees agreed to sell their business, undertaking and assets, including book debts and the full benefit of all agreements which were then vested in the licensees or wherein the licensees had directly or indirectly a beneficial interest, and also all other agreements connected with the licensees' business whereunder the licensees were entitled to any benefit to the said electrical and engineering company. The agreement further provided that the said company would pay and discharge all the trade debts and liabilities of the licensees of every kind in due course of business, and within six months from the date thereof would carry out and complete all their existing contracts the licensees might have entered into, and would indemnify the vendors against all claims and responsibilities arising out of the debts, liabilities, and contracts.

The defendant, as director of the licensees, was a party to affixing the seal of the company to this agreement in the usual way.

By a special resolution passed and confirmed early in 1901 it was resolved to wind up the licensees voluntarily, and the defendant was appointed liquidator and was authorised, when the debts and liabilities of the licensees had been paid and satisfied, to distribute among the contributories such fully paid-up shares in the capital of the purchasing company as should be capable of distribution. The licensees' assets were more than sufficient to pay the creditors of the company in full, including the plaintiffs. All the other

creditors were paid. The 300*l.* due on 1 March, 1901, to the plaintiffs for the licence under the above agreement was not paid to them at that date, or at all, by the licensees. By a deed dated 25 March, 1901, the business, goodwill, and assets of the licensees and the benefit of all contracts, were assigned to and vested in the new company, the new company covenanting to keep the licensees indemnified against all claims and demands by reason of the non-performance or non-execution of the said contracts. The defendant, as liquidator of the licensees, paid the creditors other than the plaintiffs in full, and distributed the assets among the contributories of the licensees.

On 6 August, 1901, an account purporting to show the manner in which the liquidation had been conducted was laid before a general meeting of the licensees, and on the following day the defendant made the usual return required by section 148 of the Companies Act, 1862, to the Registrar of Joint-Stock Companies, of such meeting having been held, and on 7 November, on the expiration of the statutory three months, the licensees were deemed to be dissolved.

The plaintiffs had no notice or knowledge of the liquidation until June, 1902, nor of the dissolution till later. The new company refused to pay their claim, and the plaintiffs thereupon brought this action against the defendant as liquidator of the licensees, alleging that he wrongfully and in breach of his duty as liquidator had made no provision for the claim of the plaintiffs, and had distributed the assets without making such provision, and claimed, by way of damages (1) 1,800*l.* under the agreement of 2 March, 1900, and (2) 124*l.* for the lamps so supplied.

Gore-Browne, K.C., and S. R. Earle, for the plaintiff:

By section 138 of the Companies Act, 1862 (2), the liquidator has the statutory duty of distributing the assets of the company

(2) Companies Act, 1862, s. 133: "The following consequences shall ensue upon the voluntary winding-up of a company: (1) The property of the company shall be applied in satisfaction of its liabilities *puri passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst

the members according to their rights and interests in the company. (2) Liquidators shall be appointed for the purpose of winding-up the affairs of the company and distributing the property. . . . (10) The liquidators shall pay the debts and adjust the rights of the contributories amongst themselves."

pari passu among the creditors. The old company having been dissolved, the plaintiffs' remedy under section 138 of the Act, as extended by section 25 of the Companies Act, 1900, against the old company has gone. The statutory remedy is gone, and the plaintiffs cannot sue the defendant as director: *Coxon v. Gorst* [1891] (3); but as liquidator the defendant has been guilty of negligence in permitting the company to be dissolved without paying the plaintiffs' claims. The liquidator is a statutory trustee: *In re Paraguassu Steam Tramroad Co., Black & Co.'s Case* [1872] (4); *In re Oriental Inland Steam Co.* [1874] (5); and if he fail in his statutory duty he is liable to an action: *Schinotti v. Bumstead* [1796] (6); *Carden v. General Cemetery Co.* [1889] (7); *Tilson v. Warwick Gaslight Co.* [1825] (8); *Ross v. Rugge-Price* [1876] (9). *Knowles v. Scott* [1891] (1) is distinguishable, as there the liquidation was still pending, and the plaintiff as contributory had his remedy under section 138 of the Companies Act, 1862.

In *In re Hill's Waterfall Estate and Gold-Mining Co.* [1896] (10), the question of negligence was not properly raised. The defendant knew the plaintiff's right and should have communicated with the plaintiff: *Palmer's Company Precedents* (8th ed.), Part II., p. 242.

Uppjohn, K.C., and A. Adams, for the defendant:

Knowles v. Scott (1) governs this case. The liquidator is only the agent of the company. This was the view taken by JAMES, L.J., in *In re Anglo-Moravian Hungarian Junction Railway* [1875] (11), and is that adopted by ROMER, J., in *Knowles v. Scott* (1); and in the absence of fraud or *mala fides*, admitting that section 138 of the Companies Act, 1862, imposes the duty on the liquidator of paying creditors and distributing the assets among the contributories, that does not say that he must pay all, whether they have made their

(3) [1891] 2 Ch. 73; 60 L. J. Ch. 502; 64 L. T. 444; 30 W. R. 600.

(4) L. R. 8 Ch. 254; 42 L. J. Ch. 404; 28 L. T. 50; 21 W. R. 249.

(5) L. R. 9 Ch. 557; 43 L. J. Ch. 699; 31 L. T. 5; 22 W. R. 810.

(6) 6 Term Rep. 646.

(7) 5 Bing. (N. C.) 253; 7 Scott, 97; 7 D. P. C. 275; 8 L. J. C. P. 163.

(8) 4 B. & C. 962; 7 D. & R. 376; 4 L. J. (O. S.) K. B. 53; 28 R. R. 529.

(9) 1 Ex. D. 269; 45 L. J. Ex. 777; 34 L. T. 535; 24 W. R. 786.

(10) 3 Manson, 158; [1896] 1 Ch. 947; 65 L. J. Ch. 476; 74 L. T. 341.

(11) 1 Ch. D. 130; 45 L. J. Ch. 115; 38 L. T. 650; 24 W. R. 122.

claims or not, but is very much in *pari materiâ* with section 138. If the liquidator is only an agent, then, as regards outsiders, he is not liable for mere nonfeasance, but only for tort. If that is so, *Knowles v. Scott* (1) governs this case. There is nothing in the Companies Acts or elsewhere to show that on the dissolution of the company the liquidator becomes the principal. If that is so, either *Knowles v. Scott* (1) governs this case or was wrongly decided. In any case the liquidator is not liable for the lamps supplied, but the new company are willing to return them, except those which have been broken in experimenting.

Gore-Browne, K.C., replied.

FARWELL, J.: I think I see my way to distinguish this case from *Knowles v. Scott* (1). [His Lordship then stated the facts of the case and continued:] The defendant took no steps whatever to ascertain the claims of any creditors against the old company, except by inserting advertisements in six London newspapers. He knew of the existence of this claim by the plaintiffs for the payment of the licence, but he says he did not know—and I accept his statement—of the existence of the claim for the lamps. If, however, he had performed that which I consider to be the duty of a liquidator, namely, not merely to advertise for creditors, but to write to the creditors of whose existence he knows, and who do not send in claims, and ask them if they have any claim, he would undoubtedly have received a claim, not merely for the instalments payable under the licence, but also for the purchase-money of the lamps. The advertisements themselves are of a most unusual character, the earliest appeared in a paper of 20 April, 1901. They require all creditors to send in their claims by 25 May, 1901, giving them little more than a month, on pain of being excluded altogether. The defendant says that he did not pay one single creditor, that he took no steps whatever to see to the payment of any creditors, but left it to the new company, and trusted entirely to their covenant of indemnity, and proceeded to call the final meeting of the old company, which would involve its dissolution at the end of three months, without inquiring whether the new company had paid all the debts or not. As liquidator, he received, moreover, the

consideration from the new company for distribution among the shareholders of the old company, and he did so distribute it, and as a shareholder himself he secured 2,948 shares, which were nominally at par at the time, although not saleable to any extent. A more gross dereliction of duty on the part of a liquidator I have seldom heard of.

The question now arises whether he is under any liability to the plaintiffs, who sue in respect of debts of the old company, the plaintiffs knowing nothing whatever of the winding-up, not having seen the advertisements, not knowing that the old company, their debtor, had dissolved and disappeared. It certainly would be somewhat shocking if there were no remedy in such a case as this, and I am glad to have been able to persuade myself that there is cause for action against the liquidator.

Section 138 of the Companies Act, 1862, enacts that "The following consequences shall ensue upon the voluntary winding-up of a company"; and sub-section 1 provides: "The property of the company shall be applied in satisfaction of its liabilities *pari passu*," and so on; and sub-section 2, that "Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property"; and sub-section 10: "The liquidators shall pay the debts of the company and adjust the rights of the contributories amongst themselves." Then section 138 gives power in a voluntary liquidation to any liquidator or a contributory of the company to apply to the Court. That has been amended by section 25 of the Companies Act of 1900, which allows a creditor to apply in the winding-up, and in a voluntary winding-up an application under section 138 of the Companies Act of 1862 may be made by any creditor of the company. In my opinion, the effect of these sections is to impose a statutory duty on the liquidator to pay the debts of the company, with a remedy if and so long as the liquidation continues, by application in the liquidation under the old Act by contributories for their rights, and under the new Act by creditors also to assert their rights. But if and when and as soon as under the provisions contained in the original Act the old company shall be dissolved, so that there is no longer existing any liquidation, then there is no longer any remedy given by the Act. The duty remains as an absolutely statutory duty to pay the debts, and there

being then no remedy to the creditor given by the statute, because the statutory remedy has come to an end, in my opinion the ordinary rule applies, that the common-law remedy remains to the creditor, and in such a case also to a contributory, and he can then bring what would have been in the old days an action on the case. The rules really, as regards this, are well settled. I will take them from Baron BRAMWELL's judgment in *Ross v. Ruge-Price* (9). He is dealing there with certain rules which have the same efficacy as if contained in an Act of Parliament. He says as to these rules, that the plaintiffs' case was "That they give a private right to the plaintiffs, that that private right is infringed, and then, by the general law of the land, they are entitled to bring their action on the case, as it used to be called, against the defendant for that infringement. Now Mr. Prentice does not deny any of the general propositions contained in that argument, but what he says is, that the remedy is either by eviction or by application to the Court of Exchequer, and he relied on the well-known principle of law, which is abundantly illustrated by the cases that have been cited, that where a right is conferred by a statute, and a remedy for the violation of that right is enacted by the same statute, that is the only remedy, and you can have no other. That proposition of law is not in dispute." He goes on, after saying why it does not apply there: "Therefore, I think that we are bound to hold this to be a case in which a private right is given to the plaintiffs, and that private right having been infringed by the defendant, and there being no statutory provision for a remedy to the plaintiffs, they are entitled to have recourse to the common law upon the authority of the cases that have been cited." The direction here by the Act is not limited in time. The liquidator has the duty cast upon him to pay the debts of the Company. That duty remains, although by the liquidator's own proceeding the company may have been dissolved, so that the statutory remedy is gone; the duty remains still, and there being no longer a statutory remedy, in my opinion the common-law remedy then arises.

This is the view which, in my judgment, was taken by Lord Justice JAMES of the duties of the position of a liquidator in the case of *In re London and Caledonian Marine Insurance Co.* [1879] (12). He says

(12) 11 Ch. D. 140; 40 L. T. 666; 27 W. R. 713.

there, dealing with the case of the duties of a liquidator in a voluntary liquidation, "when the liquidator has done all that he can to wind up the company, when he has disposed of the assets as far as he can realise them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is *functus officio*; then it is his duty to call a meeting, to give in his account of the affairs of the company, and to make a return to the Registrar under the Act." Then the Lord Justice goes on to meet an argument that there might be some hardship in refusing to make, what they did in that case refuse to make, a compulsory winding-up order. He says that during the existence of the company there is no hardship, because if a creditor is injured he can come and get a compulsory winding-up, or take proceedings "to obtain an injunction, as mentioned in one of the cases, to prevent the completion of the winding-up and dissolution of the company. More than that"—by which I apprehend he means that, assuming he had not been in time to prevent the completion of the winding-up and the dissolution of the company—"if there had been any miscarriage on the part of the liquidator—if he had knowingly and wilfully left unpaid a debt of which he had notice"—now that means, as I think is apparent from the later part of the judgment, not *malâ fide*; but if he had knowingly and wilfully left unpaid—that is to say, if he had not paid some debt of which he either was aware or as to which he had not done all that he could to ascertain its existence—"I am not prepared to say that the liquidator is not personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty to pay the debts *pari passu* out of the assets of the company as they came to his hands. The creditor might say, 'You have assets, you ought to have paid me; you did not pay me, and I have my remedy against you for that.' Certainly, if the liquidator were guilty of anything like *mala fides* or dishonesty or fraud"—which I apprehend to be quite different from what he has just mentioned, a statutory duty which gives a right at common law—"I do not care which word you use, or if any persons were his accomplices in that *mala fides*, dishonesty, or fraud, he and they could, no doubt, be made liable to the person defrauded by

their conduct." That is to say there would be a remedy in equity. That, in my opinion, states the position of the liquidator, limited, as I think he intended it to be limited, to the period after the completion of the winding-up and the dissolution of the company. If that be so, the case that has been cited to me, on which so much reliance has been placed, of *Knowles v. Scott* (1), has no application, and, if I may respectfully say so, it was rightly decided. It was an action by a contributory against the liquidator during the continuance of the liquidation, alleging that the liquidator was a trustee for him of certain shares, and asking originally that those shares should be transferred, and at the trial, inasmuch as they had been transferred before then, asking for damages for delay in so transferring them. It is to be observed that, inasmuch as the liquidation was then pending, there was the statutory remedy to which I have referred under section 138; and one of the grounds given by Mr. Justice ROMER in his judgment is—"It is said that, if this be so, the plaintiff had no remedy. That is not the case. He certainly could have applied to the Court under section 138 of the Companies Act of 1862." Then he goes on to say, "All I hold is, that the liquidator is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent and in no way arose from *mala fides* on his part." Limited in the way I have put to the period of the continuance of the liquidation and by reason of the existence of the statutory remedy given by section 138, I respectfully agree. The learned Judge had not to consider, nor did he in any way consider, the question which I have to consider, of the destruction of the company by the liquidator, who has avowedly absolutely neglected the statutory duty cast upon him.

As I say, I am only too glad to have been able to persuade myself that there is this remedy, because I think it would be shocking if a liquidator could do nothing in the way this liquidator has done. He did not attempt to compel the new company, of which he is himself a director, to pay the liabilities, and when the new company declines to pay for some reason absolutely unintelligible to me, it is said that he should be under no liability at all, although he has himself received and retained as liquidator 2,943 shares which, at any rate, had some value, if not par value.

It was argued that the liquidator was merely the agent of the company; but assuming this to be so, I can see nothing inconsistent in the imposition on such agent of a duty to the company's creditors. The result is, I hold that the liquidator is liable, and the amount of his liability will be in respect of the payments under the licence; the amounts due, subject to discount at 5 per cent. That had better be proved by affidavit unless the parties can agree, and the amount can go into the order. There will also be judgment for the purchase-money of the lamps, less such number of the lamps, not exceeding, I will say, one hundred, as have been burnt out in experimentalising—to be reduced to 1s. if the lamps are returned by the new company.

Solicitors: *Braby & Macdonald*, for the Plaintiffs.

George Terrell, Terrell & Varley, for the Defendants.

IN RE BROWN AND GREGORY, LIMITED, ANDREWS
v. BROWN AND GREGORY, LIMITED.

1904, August 2, 8, 10. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

Company—Debentures—Transfer to Trustee for Creditors—Transferor Indebted to Company—Debenture-holders' Action—Money Available for Dividend—Claim by Trustee—Cross-claim by Company.

THIS was an appeal from a decision of BYRNE, J. (*ante*, p. 218), upon the further consideration of a debenture-holders' action, in which there was a fund in Court available for distribution in payment of a dividend to the debenture-holders. The further consideration was upon the footing that the present appellant, Palmer, was the registered holder of thirty debentures of the defendant company as trustee under a creditors' deed for the creditors of a firm, and the question was whether Palmer, as assignee of the assets of the firm, was entitled to receive out of the fund in Court dividends in respect of the thirty debentures without first paying or bringing into account a debt due from the firm to the defendant company.

Norton, K.C., and M. M. Macnaghten, for the appellant Palmer.

Rowden, K.C., and T. H. Watson, for the plaintiffs.

On the hearing of the appeal it appeared that Palmer was not in fact the registered holder of the debentures in question.

Their Lordships thereupon dismissed the appeal, without prejudice to any application which Palmer might make to the Judge in the Court of first instance for the purpose of varying the Master's certificate, or to enforce any equitable right which he might have on the footing that he was not the registered owner of the debentures—the application to be made by 1 December, 1904. If the application was made, the costs of the appeal were to be dealt with in such manner as the Judge might direct. If the application was not made by the day named the appellant was to pay the costs of the appeal.

Solicitors: *James, Mellor & Coleman, for Palmer.*

*Collyer-Bristow, Hill, Curtis, Dods & Booth, agents
for Stone, Simpson & Mason, Tunbridge Wells, for
the Plaintiffs.*



IN RE GEORGE ROUTLEDGE AND SONS, LIMITED,
HUMMELL v. GEORGE ROUTLEDGE AND SONS,
LIMITED.

1904, July 20. BUCKLEY, J.

*Company—Debentures—Purchase by Company of its Own—Re-sale by Company—
Rights of Purchasers.*

The effect of a company purchasing its own debentures is to extinguish the debt, for the company cannot be at the same time both mortgagor and mortgagee of its own property

Where, therefore, a company had taken transfers to itself of its own debentures, and had registered them in its own name and had afterwards re-sold the debentures, the purchasers were held to have acquired no right to share with the other debenture-holders of the same series in the distribution of the proceeds of the security.

FURTHER consideration and summons.

The main question raised in this case was whether the company had power to purchase and re-sell its own debentures.

George Routledge and Sons, Limited, was incorporated on 19 November, 1889, for the purpose of taking over the business of wholesale and retail booksellers and publishers, formerly carried on by G. Routledge, R. W. Routledge, and E. Routledge in partnership.

The objects for which the company was established, as enumerated in its memorandum of association, were (*inter alia*) “(f) To borrow or raise by the issue of bonds, mortgages or any other securities charged upon all or any part of the undertaking or property of the company, including its uncalled capital, or, after the registration of the company, by the issue of debentures or debenture stock, perpetual or terminable, or without any such security, and upon such terms as to priority or otherwise as may be thought fit, such sums of money as may be thought expedient, and in particular, but not so as to restrict the general powers herein contained, after the registration of the company, to create first mortgage debentures for an aggregate sum of 75,000*l.* carrying interest at 5 per cent. per annum, and, if necessary or desirable at any time, to renew any of such first mortgage debentures; but the company shall not have power at any time during the existence of any first mortgage debentures so created, or any first mortgage

debentures issued in renewal thereof, to grant any mortgage or charge of any kind which shall have priority over or rank with the mortgage or charge created by such first mortgage debentures without the consent in writing of the holders of the first mortgage debentures for the time being outstanding."

Article 107 of the company's articles of association provided that "without prejudice to the general powers conferred by the last preceding clause and the other powers conferred hereby, it is hereby expressly declared that the directors shall have the following powers: . . . (7) They may from time to time borrow for the purposes of the company such sums of money as they may think proper, and they may secure the repayment of any money so borrowed and the interest thereon by mortgage of the whole or any part of the company's property including capital, whether called up or not, or, after the registration of the company, by the issue of mortgage or other debentures or bonds or upon such other security and upon such terms as they may think fit, and in particular, but not so as to restrict the general powers hereby conferred, may, after the registration of the company, create first mortgage debentures for an aggregate sum of 75,000*l.*, carrying interest at 5 per cent. per annum, which shall have priority over all other mortgages or securities of the company. And they may from time to time appoint directors or others to act as trustees of any mortgage or other security, with or without remuneration to be paid by the company."

In January, 1890, the company issued a series of 750 first mortgage debentures of 100*l.* each carrying interest at the rate of 5*l.* per cent. per annum. These debentures were all in the same form. By each of these debentures the company covenanted to pay the 100*l.* thereby secured to the holder, his executors or administrators, or other the registered holder thereof for the time being, in accordance with the appended conditions.

The material conditions were the following:

"1. This debenture is one of a series of like debentures, limited to the sum of 75,000*l.*, issued or to be issued by the company. The debentures of the said series are all to rank *pari passu* as a first charge on the property and assets of the company, without any preference or priority one over another, and such charge is to be

a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures."

"8. The company will keep a register containing the names and addresses of the holders for the time being of the debentures, and such register shall at all reasonable times during business hours be open to the inspection of the registered holder of this debenture and his legal personal representatives, or any person authorised in writing by him or them.

"4. Every transfer of this debenture must be in writing under the hand of the registered holder, or his legal personal representatives. The transfer and this debenture must be delivered at the registered office of the company with a fee of 2s. 6d., and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered.

"5. The registered holder of this debenture shall for all purposes be regarded as exclusively entitled to the benefit thereof, and the company shall not be bound to enter on the register notice of any trust, or recognise any right in any other person."

"10. The company will on the first day of October, 1896, and on the first day of October in every subsequent year redeem, at a premium of 5 per cent., equal to 105 $\frac{1}{2}$ l. per bond, one-tenth of the said debentures until the whole of the said sum shall have been paid off."

"11. The debentures which shall from time to time be so redeemed shall be ascertained by drawings which shall take place not less than one month nor more than two months before the day hereby appointed for such redemption."

"14. Immediately after this debenture has been drawn notice in writing of such drawing shall be sent by the company to the registered holder thereof."

Shortly after the issue of these debentures some of the debentures came into the market, and the company at various times purchased the sixteen debentures now in question from the registered holders. In the case of every purchase of a debenture the company entered itself on the register of debentures as the registered holder of the debenture. The debenture was in each case stamped on the back with a rubber stamp "This bond was transferred from

to Geo. Routledge and Sons Limited," and the date and the name of the transferor were filled in.

These debentures were subsequently sold and transferred to the claimants, and each debenture was stamped on the back with a rubber stamp "This bond was transferred from Geo. Routledge and Sons Limited to _____," and the date and name of the transferee were filled in. In 1900 the present action was brought by the plaintiffs on behalf of themselves and all other debenture-holders to realise their security, and on 9 August, 1900, the usual judgment in a debenture-holder's action was pronounced.

On 14 September, 1900, the claimants were served with notices of the judgment.

Objection having been taken before the Master to the validity of the debentures held by the claimants, the Master by his certificate, dated 23 February, 1904, reserved the matter to be dealt with by the Court.

The present summons was taken out by the plaintiffs in the action, to which the claimants were made respondents, asking that the further consideration might be proceeded with, and it now came on to be heard with the further consideration.

J. K. Young, for the plaintiffs:

The sixteen debentures in question are not entitled to rank *pari passu* with the other debentures of the same series. A person who borrows money cannot be his own creditor so as to set up an incumbrance of his own against his creditor: *Watts v. Symes* [1851] (1) and *Otter v. Lord Vaux* [1856] (2). It would be against conscience.

Moreover, these debentures cannot be re-issued. They form part of one series, and the provisions as to drawings are quite inconsistent with their re-issue. *Adams v. Angell* [1877] (3) and *Thorne v. Cann* [1894] (4) do not apply. They were cases in which the purchaser of an equity of redemption paid off a mortgage debt which was not created by himself. If this reasoning is right, the

(1) 1 De G. M. & G. 240, 244; 21 L. J. Ch. 713; 16 Jur. 114.

(2) 6 De G. F. & G. 638; 26 L. J. Ch. 128; 5 W. R. 188; 3 Jur. (n. s.) 169.

(3) 5 Ch. D. 634; 46 L. J. Ch. 54, 352; 36 L. T. 334.

(4) [1895] A. C. 11, 18; 64 L. J. Ch. 1; 71 L. T. 852; 11 B. 67.

transferees of these debentures cannot stand in a better position than the company itself. They took them with notice from the company, and therefore subject to all equities attaching to them.

The holders of the other debentures of the series have done nothing to estop themselves by their conduct from denying the validity of the debentures in question : *Mowatt v. Castle Steel and Iron Works Co.* [1886] (5).

S. R. Earle, for *W. B. Fordham*, one of the respondents :

It is not disputed that *Fordham* took two of the debentures from the company, and it would be most inequitable that they should be treated as waste paper. The real question involved in the case is one of merger. It would be a misapplication of the doctrine of merger to hold that these debentures are merged. *Thorne v. Cann* (4) is directly in point.

[*BUCKLEY, J.*: That was a case in which the person taking the transfer was not liable to pay the debt.]

The true doctrine is that, where an owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether these charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention : per Lord *MACNAGHTEN* in *Thorne v. Cann* (4). This being the rule in equity as regards mortgages, there is nothing on the face of the debentures which is inconsistent with its application to the present case. There is here no evidence of any intention on the part of the company to extinguish the debentures. On the contrary, the only possible inference to be derived from the registration of the debentures in the company's name is that the company thereby intended to keep them alive. The Court will not defeat this intention by holding that they have been extinguished : *Liquidation Estates Purchase Co. v. Willoughby* [1898] (6).

But, assuming that the original debentures became merged, the company at the time it transferred the debentures to the applicant had ample power under its memorandum and articles of association to borrow up to 75,000*l.* The company has, it is submitted,

(5) 34 Ch. D. 58; 55 L. T. 645.

(6) [1898] A. C. 321; 67 L. J. Ch. 251; 78 L. T. 329.

by transferring these debentures to the claimant, entered into a contract to give him a mortgage which constitutes an equitable charge on the property comprised in the debentures, and the claimant is therefore entitled to rank *pari passu* with the holders of the other debentures: *In re Strand Music Hall Co.* [1865] (7), and *In re Queensland Land and Coal Co., Davis v. Martin* [1894] (8).

[He also referred to *In re Radcliffe* [1856] (9).]

Buckmaster, K.C., and *Ashworth James*, for other holders of the sixteen debentures :

The question turns on the bargain entered into by the company with the debenture-holders (conditions 1 and 10). The claimants' documents remain good as evidence of the contract by the company to give debentures until the limit fixed is reached. There is nothing to prevent the company from issuing further debentures unless debentures to the amount of 75,000*l.* have been issued.

[They referred to *Stevens v. Mid-Hants Railway* [1879] (10) and *Capital and Counties Bank v. Rhodes* [1903] (11).

A. Sims, for another holder.

BUCKLEY, J.: I should have thought this case was unarguable; I have heard argument upon it, and I still think it is unarguable. The company had power to issue debentures to secure sums up to the aggregate amount of 75,000*l.*, each debenture ranking *pari passu* with the others. The debentures are in the usual form. There is a covenant to pay the principal at the date when it becomes due, and in the meantime to pay interest on the same. There is also a charge by way of floating security on the undertaking and assets of the company. Amongst the conditions of the debentures is one that a register of debentures shall be kept, in which every transfer shall be entered. What happened was this: The company issued all the debentures, and the names of

(7) 3 De G. J. & S. 147; 13 L. T. 177; 14 W. R. 6.

(8) 1 Manson, 355; [1894] 3 Ch. 181; 63 L. J. Ch. 810; 71 L. T. 115; 42 W. R. 600; 8 R. 476.

(9) 22 Beav. 201.

(10) L. R. 8 Ch. 1064; 42 L. J. Ch. 694; 29 L. T. 318; 21 W. R. 858.

(11) [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255; 51 W. R. 470.

the debenture-holders were registered. Subsequently the company bought in the market some of its own debentures. Upon those purchases this took place: The debenture-holder executed to the company itself a transfer in the common form. [His Lordship read the transfer, and continued:] The debenture having been delivered at the office of the company for registration, was then stamped on the back with a rubber stamp which bore the words "This bond was transferred 18 from to secretary." This form was filled up in the case of each transfer with the name of the company as transferee. Then they made an entry in the register of debenture-holders to the effect that the company was the registered holder of the debenture. What was the effect of the transaction? The company had become the assignee of its own debt, and had become bound to pay itself 100*l.* and interest. It had also become the assign of its own undertaking, by way of charge to secure the payment. The result, to my mind, is that the debt was absolutely gone. A man cannot be the assignee of his own debt and mortgagee of property of which he is also mortgagor. The debt was gone, the security was also gone. Subsequently the company transferred these debentures. The transfer was again in common form. The debenture was again stamped on the back with a note of the transfer, and the names of the transferees were put on the register in respect of the debenture. To my mind, that operation had no effect. The purchasers were transferees of nothing. There was no debt in existence: there was no security in existence at the date of the transfer to them.

A second argument was raised as follows: It is said quite truly that when the person who took the transfer paid his money for it, he thought that what was being transferred to him was a debenture forming part of the 75,000*l.* series. Thereupon, it was argued, the company was bound to give effect to that which was the real bargain between the parties by issuing to him a new debenture if this transaction did not result in giving him such a security. But was there such a contract? To my mind there was not. There was no bargain to give him anything more than a transfer of this supposed debenture. Let me take an illustration. Suppose the debentures had been debentures not assignable, free

from equities. The transferee of such a debenture would get something to which were attached equities subsisting at the date of the transfer as between the company and the debenture-holder. According to the respondent's contention, however, the transferee would be entitled to a new debenture to which no equities attached. But he did not bargain for that. He made a bargain by which he was to get something which, unfortunately for him, had become a dead thing. It is true that he did not pay his money in that expectation; but that was all he did get. There was no contract between him and the company except that he should have an assignment of this debenture. The second ground, therefore, on which the argument for the respondents is put fails.

I agree that if there is a contract that a person is to have a loan on the terms that the lender is to have a binding security, and he does not get that which he contracted to have, he has the right to be placed in the same position as if he had got it. But this loan was different; it was not made on the terms that there should be issued to the lender a particular security, but that there should be transferred to him something which was not a security—something which the company had not got, and therefore could not transfer to him. I think that these sixteen debentures have ceased to be securities, and I therefore declare that they do not rank *pari passu* with the other debentures of the same series.

Solicitors: *R. S. Taylor, Son & Humbert*, for the Plaintiff.

H. J. Manning; Seaton & Taylor; Nathaniel Reynolds, for the various Respondents.



FINANCE AND ISSUE, LIMITED *v.* CANADIAN
PRODUCE CORPORATION.

1904, August 5, 12. BUCKLEY, J.

Company—Irregular Allotment—Voidable or Void—Company Registered before Companies Act, 1900—Companies Act, 1900, ss. 4 and 5.

An allotment of shares made by the directors of a company before the minimum subscription is obtained is voidable, not void. If, owing to the fact of the company having been registered before the passing of the Companies Act, 1900, the time limit fixed under section 5 by reference to the statutory meeting is inapplicable, the shareholder may rescind his contract to take the shares at any time before he has affirmed it expressly or by conduct.

An allotment by directors in contravention of section 4 is not *ultra vires*, but is simply a breach of a statutory duty for which the shareholder has his legal remedy. The Court will not, therefore, interfere by injunction to restrain the directors from proceeding with the allotment.

MOTION by the plaintiff company that the defendant company, its directors and officers, might be restrained by injunction until judgment or further order from returning to any of the persons to whom shares in the defendant company had been allotted any of the money paid by such persons on application for or allotment of such shares and from cancelling or purporting to cancel any of them.

The defendant company was registered on 23 September, 1897, with a nominal capital of 1,000*l.* divided into 1,000 shares of 1*l.* each. In 1898 the nominal capital of the company was by special resolution increased to 200,000*l.* divided into 200,000 shares of 1*l.* each.

Down to May, 1904, only the seven shares subscribed for by the signatories to the memorandum of association had been allotted. In that month the defendant company, being desirous of making a public issue of its capital with a view to commencing business other than that of carrying out the agreement referred to in clause 3, sub-clause (a) of its memorandum of association, approached the plaintiff company with the view to the latter company taking in hand such public issue and paying the expenses in connection therewith, and undertaking other obligations of the company. This the plaintiff company agreed to do. Accordingly, on 12 May, 1904, an agreement was entered into between the

plaintiff company of the one part and the defendant company of the other part, which provided—first, that the plaintiff company should bear and pay the expense of issuing and advertising the prospectus, inviting subscriptions for 186,000 of the shares in the capital of the company; secondly, that the defendant company should at its own expense provide the plaintiff company with the requisite number of prospectuses and applications; that such prospectus should be issued in England not later than 11 May, 1904; thirdly, that, subject to the defendant company going to allotment and paying to the plaintiff company the considerations thereafter provided, the plaintiff company undertook to satisfy and discharge certain payments to one W. R. Nursey, and the fees payable to brokers, solicitors, and others for services rendered to and for payments made on behalf of the defendant company since the date of its incorporation, and underwriting commissions; fourthly, that in consideration of the payments and obligations thereby agreed to be made and incurred by the plaintiff company the defendant company agreed to pay to the plaintiff company the sum of 21,000*l.*, payable as to 7,000 in cash and as to the balance of 14,000*l.* by the allotment to the plaintiff company or its nominee or nominees in writing appointed 14,000 fully paid shares of 1*l.* each in the capital of the defendant company, such shares to be numbered 186,001 to 200,000 inclusive; that such sum of 7,000*l.* should be paid as to 4,000*l.* within certain specified times; that the 14,000 fully paid shares should be allotted to the plaintiff company or its nominee or nominees in writing within one calendar month after the first general allotment of shares; fifthly, that the 14,000 fully paid shares should not rank for dividend until a total aggregate dividend of 10 per cent. had been paid upon the shares allotted to the general public; and sixthly, that the defendant company should comply with section 7 of the Companies Act, 1900, in respect of fully paid shares to be allotted in pursuance of the agreement.

On 18 May, 1904, the prospectus of the defendant company was issued offering for subscription at par 186,000 out of 200,000 shares, payable 1*s.* per share on application and 1*s.* 6*d.* on allotment. At the head of the prospectus was a statement that “of this issue the directors and their friends have applied for 23,726

shares." In the body of the prospectus was a statement that "The minimum number of shares upon which an allotment will be made is 40,000."

Prior to the issue of the prospectus, subscriptions for 20,726 shares were received in advance in England, and the application money of 1s. per share in respect of such applications had been paid to the defendant company. It also appeared that prior to the issue of the prospectus the directors were informed that applications for 3,000 of the company's shares had been made in Canada, and that the application money in respect of such shares had been paid to the credit of the company at the Bank of British North America at Toronto.

On 20 May, 1904, the directors went to allotment upon a share subscription of 40,003, which included the 3,000 shares applied for in Canada. As the result of inquiries made by the directors, it was subsequently discovered that although applications had been received by the bank for 3,000 shares, the application money of 1s. per share had only been paid in respect of 2,425 of such shares.

On 30 June, 1904, a board meeting of the defendant company was held, at which the directors were informed of the non-payment of the application money in Canada, and the consequent irregularity of the allotment which had been made.

On 5 July, 1904, the secretary of the defendant company, by the direction of the directors, sent out to all the allottees of shares a printed circular which was in the following terms:

"I am desired by the directors of the Canadian Produce Corporation, Limited, to write to you with reference to the allotment of shares in the company which took place on the 20 May last. It will be remembered that the number of shares fixed by the prospectus as the minimum for allotment was 40,000, and the prospectus stated that 23,726 shares had been applied for in advance by the directors and their friends. In reckoning the number of shares applied for in advance the directors included 3,000 shares which had been applied for in Canada. The directors have recently ascertained that although 3,000 shares had been so applied for, the moneys payable on application in respect of 575 of these shares had not been paid at the time of allotment. The consequence is

that the directors in proceeding to allotment inadvertently acted contrary to the provisions of section 4 of the Companies Act, 1900, although they acted in good faith. The directors have, since they ascertained the fact, carefully considered and been advised upon the matter. The fact that such a small amount of application moneys had not been paid may seem a small matter, but having regard to the provisions of section 4 of the Companies Act, 1900, it is sufficient to invalidate the allotment, and acting upon the advice of counsel the directors have decided to give to each allottee of shares the option of having the money paid by him or her repaid and the allotment cancelled. Will you kindly sign the accompanying form stating your desire in the matter and send the same to me as soon as possible, and not later than the 25th inst."

The directors had since the issue of the circular discovered that the applications for the said 3,000 shares were very largely for preference shares and not ordinary shares, which were the only class of shares offered for subscription by the prospectus, and that all such applications were made conditional upon an allotment being made by a date prior to the issue of the prospectus.

The plaintiff company was the holder of 5,000 shares in the defendant company, on which it had paid the application moneys.

On 21 July, 1904, the plaintiff company commenced the present action—first, for specific performance of the agreement of 12 May, 1904, and damages for breach either in addition or alternatively; and secondly, for an injunction to restrain the defendant company from returning to any of the persons to whom any shares in the defendant company had been allotted any of the moneys paid by them on application for an allotment of shares in the defendant company.

Buckmaster, K.C., and A. Houston, for the plaintiff company:

The allotment here was no doubt irregular and voidable; but it is not for the defendant company to rescind the contract. That is a matter for the election of the individual shareholders in an ordinary case, but this is not an ordinary case. The company was registered before the passing of the Act of 1900, although the issue

of the capital was subsequent thereto. Section 5 of the Act (1), which fixes the right to rescind at one month from the date of the statutory meeting, has, therefore, no application to this company. The shareholder's right of rescission is therefore gone and his only remedy is against the directors personally: *In re Economising Gas Co., Gover's Case* [1875] (2). But the plaintiff company is not asking to rescind. It desires to affirm the allotment although irregular, and the defendant company ought therefore to be restrained from doing an act injurious to the interests of the plaintiff company as a large shareholder in the defendant company.

(1) Companies Act, 1900, s. 4:
“(1.) No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely,—

“(a) the amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

“(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company.

“(2.) The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

“(3.) The amount payable on application on each share shall not be less than 5 per cent. of the nominal amount of the share.

“(4.) If the conditions aforesaid have not been complied with on the expiration of forty days after the first

issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the applicants without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of 5 per centum per annum from the expiration of the forty-eight days; Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

“(5.) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

“(6.) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.”

“Section 5: (1.) An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.”

(2) 1 Ch. D. 182; 45 L. J. Ch. 83; 33 L. T. 619; 24 W. R. 125.

Astbury, K.C., and George Henderson, for the defendant company:

An allotment in contravention of section 4 of the Act (1)—that is, where the minimum subscription has not been obtained—is void and not merely voidable. But even if this is not so, and the contract is voidable, the shareholder's option to rescind remains, and the directors were right in tendering the allottees their money back. The fact that section 5 (1) does not apply to this company owing to its having been registered prior to the passing of the Act, does not take away from the shareholders their right of rescission: it only eliminates the time limit for rescission fixed by the section, and in so doing really betters the position of the shareholders.

Moreover, the action is misconceived. Even if the directors have acted irregularly, there is nothing in what they have done which is *ultra vires* the company so as to justify the interference of the Court by injunction. It is merely the case of a breach of a statutory duty for which the shareholder has his remedy at law.

Cur. adv. vult.

August 12.

BUCKLEY, J., read the following judgment: The defendant company was incorporated in 1897 with a capital of 1,000*l.* in 1*l.* shares. In 1898 it increased its capital to 200,000*l.* in 1*l.* shares. Down to May, 1904, it had made no allotment beyond seven shares to the subscribers of the memorandum of association. In 1904 it was minded to offer its capital for subscription. With a view thereto an agreement was, on 12 May, 1904, executed between the defendant company of the one part and the plaintiff company of the other part, the effect of which was that the plaintiff company agreed to pay the expenses of issuing and advertising the prospectus, and agreed to pay certain other sums mentioned in clause 3, and in consideration of those payments the defendant company agreed to pay the plaintiff company a sum of money, partly in cash and partly in fully paid shares, at certain dates, calculated from the date of the first general allotment. That agreement did not, in my opinion, give the plaintiff company any right to dictate to the defendant company in any way as to going to allotment, although, if the defendant company did not go to allotment the plaintiff

company might have some right in damages. For the purposes of the present application the agreement is, I think, one which gives the plaintiff company no right in respect of the order for which it is asking. On 18 May, 1904, the prospectus was issued, offering 186,000 out of the 200,000 shares, at par, payable 1s. on application and 1s. 6d. on allotment. At the head of the prospectus it is stated that "of this issue the directors and their friends have applied for 23,726 shares," and in the body of the prospectus it is stated that "the minimum number of shares upon which allotment will be made is 40,000." On 20 May the defendant company went to allotment and allotted 40,003 shares, of which 5,000 were allotted to the plaintiffs. Of these 40,003 the 3,000 shares presently mentioned formed part. The facts as to the 23,726 shares which the prospectus stated had been applied for are, that 20,726 of them had been applied for in England, and the 1s. on application paid upon them, and that the directors were told that the remaining 3,000 had been applied for in Canada and the application money paid also upon those. The real facts as to the 3,000 shares, as subsequently ascertained, were that the applications were largely for preference shares, whereas the defendant company had no preference shares and was not offering any such for subscription, and that all these applications were made conditional upon an allotment being made by a date prior to the issue of the prospectus, a condition which was not complied with; and, further, that as regards 2,425 only of that number had the application money of 1s. a share been paid, leaving 575 upon which nothing had been paid on application. The directors learned about 30 June, 1904, the fact that upon the 575 shares the application money had not been paid. They immediately took legal advice, and, as the result, on 24 July, 1904, sent to the allottees a circular stating that upon the 575 shares the application money had not been paid, and offering the allottees the option of having the money paid by them repaid and the allotment cancelled. It is stated, though not proved, that the holders of some 24,000 shares availed themselves of this option. This circular went to the plaintiff company amongst others, and on 19 July, the company, by its solicitors, wrote a letter threatening proceedings if the circular was not withdrawn. The directors, conceiving that the course which they had taken

was the only honest course open to them, did not accede to this demand, and in the result the writ in the present action was issued and notice of motion given on 22 July for an injunction to restrain the defendant company from returning the money on the shares and cancelling the allotment.

The question to be decided involves an important point arising upon the Companies Act, 1900. The defendant company is one registered in 1897, and to which therefore section 12 of the Act of 1900 does not apply. It is a company which could not hold a statutory meeting within that section. The definition in section 5 of the point of time within which an applicant can seek to avoid an allotment is consequently inapplicable to the present case. But for the purpose of construing the Act I must, of course, regard the case of all companies to which the Act applies. By reason of the facts which I have stated, the conditions mentioned in section 4 of the Act of 1900 had not been complied with, for the amount named in the prospectus as the minimum subscription had not been subscribed, and the sum payable on application upon that amount had not been paid. The provision therefore of the Act had taken effect that "no allotment shall be made" of the share capital in question.

The defendant company argues that the result is that the allotment was altogether void. In my judgment, that contention rests upon a wrong construction of the Act. An allotment in breach of section 4 cannot be void, for section 5 provides that such an allotment shall be voidable within a certain time and not later. It is, therefore, not a void, but a voidable allotment. It is true, however, that the time within which section 5 provides that it shall be voidable is, for the reasons which I have given, not applicable to this case. Under what circumstances, then, is it voidable in this case, or is it not voidable at all?

Upon this point the plaintiff company argues that it was long ago decided, under section 38 of the Companies Act, 1867, that that section gave rise only to rights as against the directors or others who issued the prospectus, and did not give rise to any right of rescission, and it argues that the same is true of section 4 of the Act of 1900. It contends that section 5 of the Act of 1900 is an empowering section creating a right of avoidance in the cases to which it applies, and that, inasmuch as section 5 cannot apply to

the present case, the allotment cannot be cancelled. This contention, in my judgment, cannot be supported. Section 38 of the Act of 1867 is addressed to the representation which induces the contract. Section 4 of the Act of 1900 is addressed to an essential constituent of the contract itself. If the allotment be successfully attacked the contract is gone. A breach of the veto which the Act imposes in certain events upon proceeding to allotment gives rise, I think, to a right of rescission of the contract. Then section 5 imposes a limit of time within which that right of rescission must be enforced. It is a limit which is not applicable in the present case. It follows, I think, that the voidable contract remains a contract voidable for breach of the statutory provision that the company shall not go to allotment unless a condition is satisfied which has not been satisfied. I am conscious that this conclusion must have a very far-reaching effect, for, as regards companies registered before the commencement of the Act of 1900, it leaves such companies exposed for an indefinite time to consequences from which companies registered after that date are in a short time relieved by section 5. Probably the remedy is to be sought in the fact that a small amount of acquiescence after knowledge would bar any right of rescission.

It follows from the foregoing that the plaintiff company has no right to sue. If the company were acting *ultra vires*, any shareholder could, no doubt, enjoin it. But if the act of the company is not *ultra vires*, and only in breach of a statutory provision the neglect of which renders the contract voidable, the plaintiff company has no right to an injunction.

A further point is this. The statement as to the 23,726 shares at the head of the prospectus, though innocently made, was, in fact, untrue. For the purpose of rescission the fact that the misrepresentation was innocently made is not material. Upon the general law, apart from the statute, it seems to me that persons who applied upon the faith that that statement was true would be entitled to relief. This goes to show that, even if the plaintiff company could sue at all, the notice of motion is at any rate too wide.

There remains a third point. The words in the prospectus that "the minimum number of shares upon which allotment will be made is 40,000" form, in my judgment, a condition upon which the

applicant makes his application. If that condition is not complied with he is entitled (if he has done no act to affirm) to repudiate the allotment on the ground that his offer could not be accepted upon the terms under which the condition attached to the offer was not complied with, from which, again, upon the general law it would result that he would be entitled to rescission.

Upon all these grounds I think that the motion fails, and I dismiss it. The costs will be costs in the action; but if the parties consent to treat this as the trial of the action, the action will be dismissed with costs.

Solicitors: *H. Percy Becher*, for the Plaintiff Company.

J. S. Wilkinson, for the Defendant Company.

HOOLE v. SPEAK.

1904, July 7. KEKEWICH, J.

Company—Prospectus—Non-disclosure of Contracts—“Knowingly Issuing”—Advance Copy of Prospectus—Unauthorised Issue—Ratification—Companies Act, 1867, s. 38—Directors’ Liability Act, 1890, s. 3.

Directors held not liable for non-disclosure of contracts in a prospectus for which they otherwise would have been liable on the ground that it was issued without their authority.

In such a case directors cannot be made liable on the ground that they afterwards ratified and adopted the prospectus, or even derived some advantage from it.

THIS was an action by the executors of a shareholder in the London and Northern Bank against the directors for damages for non-disclosure of contracts in the prospectus.

The plaintiffs alleged that their testator, who was a shareholder in the Leeds Joint-Stock Bank, Limited, received an advance copy of the prospectus, and on the faith thereof in October, 1898, applied for 400 shares in the company, which were allotted to him, and in respect of which he paid the company 1,000*l*. The matters complained of were precisely the same as in *Broome v. Speak* [1902] (1), affirmed by the House of Lords *sub nom. Shephard v. Broome* [1904] (2), the only difference between that case and this

(1) 10 *Manson*, 38; [1903] 1 Ch. 586; 71 L. J. Ch. 716; 88 L. T. 580; 50 W. R. 614.

(2) *Ante*, p. 283; [1904] A. C. 342; 73 L. J. Ch. 608.

being that in this case the shareholder was dead before the action was brought, and the advance copy of the prospectus was issued to him without the previous authority of the directors.

At a board meeting of the company held on 12 October, 1898, the prospectus was provisionally approved by the directors, and it was then resolved to strike out of the prospectus the contracts the omission of which was complained of in this action. It had been previously agreed by the board that the shareholders of the Leeds Joint-Stock Bank, whose undertaking the London and Northern Bank were taking over, should have priority in applying for shares, and after the meeting of 12 October, 1898, Bowden, who was a promoter of the company but was not a defendant in this action, altered the prospectus which had been provisionally approved by adding the words "Advance prospectus to the shareholders of the Leeds Joint-Stock Bank, Limited," and sent out advance copies of the prospectus so altered to the shareholders of the Leeds Bank. This was done without any express authority from the directors, but the directors with full knowledge of the facts accepted applications for shares made on the faith of that prospectus. The prospectus to the general public was issued by the directors on 20 October, 1898, and it was in substance the same as that issued to the shareholders of the Leeds Bank.

Astbury, K.C., Roskill, K.C., and A. B. Cane, for the plaintiffs :

The defendants are liable in this action, as they were held to be in *Broome v. Speak* (1), the only difference between that case and this being that here the shares were taken on an advance prospectus. An advance prospectus is a prospectus or notice within section 38 of the Companies Act, 1867. It is said that the directors did not know of the issue of this prospectus; but it is clear that they ratified it, and they cannot be heard to say that they did not issue it knowingly: *Emma Silver-Mining Co. v. Lewis* [1879] (3), *Arnison v. Smith* [1889] (4), *Smith v. Chadwick* [1884] (5), and *Baty v. Keswick* [1901] (6).

(3) 4 C. P. D. 396; 48 L. J. C. P. 257; 40 L. T. 168; 27 W. R. 836.

(4) 41 Ch. D. at p. 369; 61 L. T. 63; 37 W. R. 739; 1 Meg. 338.

(5) 9 App. Cas. at p. 196; 53 L. J. Ch. 873; 50 L. T. 697; 32 W. R. 687; 48 J. P. 644.

(6) 85 L. T. 14; [1901] W. N. 167; 17 T. L. R. 664.

Gore-Browne, K.C., Muir Mackenzie, Leigh Clare, F. Russell, and Cassel, for the several defendants, were not called upon.

KERWICH, J. : This action is brought against directors seeking to make them liable under section 38 of the Companies Act, 1867, and section 3 of the Directors' Liability Act, 1890. The foundation of the action is this, that these defendants issued a prospectus which omitted to state certain contracts. It has been held by the Court of Appeal and the House of Lords in *Shepherd v. Broome* (2) that these particular contracts are contracts which ought to have been stated in the prospectus, that the omission to introduce them constituted an offence under the Acts, and that persons who subscribed for shares on the faith of this prospectus are entitled to relief against those who issued it. There was issued to one Hoole a prospectus which did not contain these contracts, and he no doubt subscribed for shares on the faith of the prospectus. As at present advised, I think it clear that Hoole's representatives are entitled to recover damages in respect of the omission against those who issued the prospectus.

But the question arises whether the present defendants authorised the issue of the particular prospectus which was received by Hoole. The prospectus was the subject of a lengthy discussion at a meeting held on 10 October, 1898, and a question then arose about these very contracts, it having been intended to mention them in the prospectus; but, owing to the objection of some of the directors, it was resolved to omit them, and the prospectus was then and there altered by cutting out the contracts. Some question has been raised as to how long some of the directors were present at the meeting. One of them appears to have been there the whole time, and one was not there at all. The others seem to have been there the greater part of the time—probably while the main business was done. But, be that as it may, a proof of the prospectus was submitted to the meeting; it had received many alterations—one an important one—but it had never taken any other form than that of a private and confidential document, which was not intended to be seen by anybody except those who were settling it. The prospectus as altered was provisionally approved, but it was only approved as a prospectus in proof, which was to be submitted

to a further meeting for final revision. That seems to me to be the meaning of "provisionally." It follows that there was no authority in any one to issue the prospectus, which, indeed, could not be issued until finally approved. Bowden was secretary and a promoter of the company, and he had no doubt a general authority to print prospectuses as he pleased, and to have proofs sent to the directors for revision; but it could not be within his authority to issue the prospectus until it was finally approved or until he had the direct authority of the board to issue it. Bowden took upon himself to do this. He was perfectly well aware that it was intended to give the shareholders in the Leeds Bank a priority in applying for shares, and, knowing this, he took a copy of the prospectus to the printers and had two proofs printed off, one being private and confidential, the other being turned into a complete document addressed to the Leeds Bank shareholders, into which he introduced words of his own, in order that these shareholders might have the prospectus, which it was intended they should have as soon as possible.' For that he had no authority at all. There had been no final approval of the particular terms of the prospectus to be issued to this limited class of shareholders. How, then, can it be said that these defendants are liable for a document which they never authorised? That is really an end of the plaintiffs' case.

It is, however, said that, although the defendants did not authorise the issue of the prospectus, they ratified and took advantage of it. In one sense that is quite true. On the evidence I am prepared to hold that it was brought to their knowledge at any rate not later than 26 October, when Hoole's application for shares was accepted. If this were a question of contract, I think I should be bound to hold that the directors ratified this contract entered into on their behalf. It is not, however, a question of contract, but of tort, and counsel for the plaintiff, when asked by the Court, was unable to find any authority to show that there is a civil remedy against a tortfeasor on the ground of his being an accessory after the fact. But we need not go into that. I base my judgment on the language of section 38 of the Companies Act, 1867. The statute says "knowingly issuing," and therefore presupposes knowledge on the part

of the directors, and points to the offence being committed at the time of the issue of the prospectus. I should be contradicting the statute entirely, and should be extending the operation of that rather harsh measure, if I were to hold that directors are liable for a prospectus which they never authorised on the ground that they had afterwards adopted it, and had even derived some advantage from it. The action must be dismissed with costs.

Solicitors: *Allen & Son*, agents for *Jones & Wells*, East Retford, for the Plaintiff.

Helder, Roberts & Co., agents for *Simpson & Simpson*, Leeds; *Williamson, Hill & Co.*, agents for *Storey, Willans & Storey*, Halifax; *Waterhouse & Co.*, for the several Defendants.

MANNERS v. ST. DAVID'S GOLD AND COPPER MINES, LIMITED.

1904, July 30. C. A. ROMER AND COZENS-HARDY, L.JJ.

Company—Memorandum of Association—Sale to New Company—Provision for Distribution of Assets and Sale of Shares of Dissident Members—Ultra Vires.

A company which had power under its memorandum of association to sell its undertaking and to accept in payment for the same shares of any other company, whether wholly or partly paid up, entered into an agreement for a sale of its undertaking to a new company, part of the consideration being shares in the new company of 5s. with 4s. credited as paid up. A clause of the agreement provided that if the selling company should go into liquidation and distribute the shares forming part of the consideration amongst its members, all shares not accepted by members within twenty-one days should be sold and applied in payment of debts and liabilities of the selling company in relief of the obligation of the new company under the agreement:

Held, that the agreement was not justified by the memorandum of association and was *ultra vires*, for the selling company had no power to contract that upon a liquidation the assets should be divided amongst its shareholders, or that if a shareholder did not choose to undertake the liability under the shares in the new company his shares should be forfeited.

THE plaintiff was a holder of 444 fully paid shares of 5s. each in the St. David's Gold and Copper Mines, Limited, hereinafter called "the company."

In 1903 it was decided by the directors to reconstruct the company, and a scheme was put forward by which the property and business of the company were to be sold to a new company which was to be formed; and 240,000 shares of 5*s.* each, credited with the sum of 4*s.* per share as paid thereon, were to be issued by the new company, so that the holders of shares in the company could take up such new shares to an amount equal in number to the shares they held in the company, but by taking up the same they would become liable to pay 1*s.* per share.

An agreement dated 23 July, 1903, was made between the company of the one part and the St. David's Gold Mines (1903), Limited (hereinafter called "the new company"), of the other part. The object of that agreement was the sale of the undertaking of the company to the new company. Clause 3 provided that part of the consideration was to be 240,000 shares in the new company, to be allotted to the company, or as it might direct, on which 4*s.* should be credited as paid. Clause 4 provided: "As further consideration for the said transfer the new company shall, subject as hereinafter mentioned, pay, satisfy, and fulfil, and indemnify the old company against all the debts, liabilities, and engagements of the old company, and in case it shall go into liquidation within twelve months from the completion of the said purchase, the new company shall pay all expenses of and incident to such winding up." Clause 5 provided: "In case the old company shall go into liquidation within the time aforesaid, and distribute the shares forming the consideration for the said sale among its members, all shares not accepted by such members within twenty-one days of the commencement of the winding up, or such extended time as the new company shall consent to, shall be sold by the old company, and shall be applied in payment of the expenses of winding up, and subject thereto in payment of debts and liabilities of the old company in relief of the obligation of the new company under this agreement."

Special resolutions were duly passed and confirmed, which provided—" (1) that, having regard to the agreement dated the 23rd day of July, 1903, for the sale of the undertaking of this company to the St. David's Gold Mines (1903), Limited, it is desirable to wind up this company, and accordingly that this company

be wound up voluntarily, and that James Junner be, and he is hereby, appointed liquidator for the purposes of such winding up. (2) That the said liquidator be, and he is hereby, authorised to distribute in specie 240,000 shares " of the new company " which form part of the consideration for the said sale among the contributors of this company rateably according to the amounts paid on the shares of this company held by them respectively, and so that each contributory shall be entitled to have his or her proportion thereof allotted to himself or herself, or to his or her nominee, or nominees, and further that the said liquidator do fix a time within which all such shares if not accepted shall be deemed to have been refused. (3) That the said liquidator do sell the shares so refused, and apply the net proceeds of such sale in, or towards, the discharge of any debts of this company, ^{and}_{or} of the costs and expenses of its winding up in accordance with the terms of the said agreement for sale."

The plaintiff, who alleged that the notices of the meetings of the company convened for the purpose of carrying the above resolutions had not reached him, did not within the time fixed by the liquidator accept the new shares, and his shares were sold and the proceeds applied or held by the liquidator upon the terms of the agreement of 23 July, 1903. He brought this action, claiming a declaration that the agreement of 23 July, 1903, was *ultra vires* and void, and an injunction to restrain the defendants from parting with the assets of the company without making proper provision for payment or satisfaction to the plaintiff of his distributive share in the assets of the company, and other relief.

The objects of the company, as stated by clause 3 of its memorandum of association, were (*inter alia*) to carry on the business of mining and working gold, copper, and other minerals; (f) "to sell and dispose of any of the property of the company or the whole undertaking, and to accept in payment for the same money or wholly or partly shares, bonds, debentures, or other securities of any other company, whether wholly or partly paid up"; (h) "to acquire, hold, or to dispose of any shares or securities of any other company, with power to distribute the same in specie, either by way of dividend or otherwise . . ."; (n) "to do all such other things, whether of the like or other sorts, as may be considered incidental

or conducive to the attainment of the above objects or any of them or to the conversion or disposition of any security or property held by the company."

Article 116 of the articles of association provided that the dissolution of the company might be determined on by special resolution, whether the object was the absolute dissolution or the reconstruction or modification of the company, and, upon any reconstruction, that it should be lawful for the liquidators to accept shares in any other company in payment for the business and property of the company or any part thereof, and to distribute the same among the members of the company in exchange for their shares; and that, in the event of any such arrangement, no member of the company should have any of the rights given to a dissentient member by section 161 of the Companies Act, 1862; but every member should be bound to accept in exchange for his shares the shares appropriated to him in such other company as aforesaid, or should be entitled, by notice given to this company not later than fourteen days after the passing of the special resolution, to require the liquidators to sell the shares in such other company appropriated to him as aforesaid, and to pay to him the net proceeds of the sale thereof; and that such net proceeds should be accepted by him in full satisfaction of all claims and demands against the company or the liquidators in respect of his shares therein, and such sale might be made in such manner as the liquidator should think fit.

The plaintiff applied to JOYCE, J., for an interim injunction to restrain the company and the liquidator from parting with the assets of the company without making proper provision for payment or satisfaction to the plaintiff of his distributive share in the assets of the company as the holder of shares therein.

The motion was heard before JOYCE, J., on 17 June and 5 July, 1904.

W. F. Hamilton, K.C., and Tindal Robertson, for the plaintiff:

This agreement is wholly void and of no effect, being *ultra vires*: *Imperial Bank of China v. Bank of Hindustan* [1868] (1) and *In re Irrigation Co. of France, Ex parte Fox* [1871] (2). This is not a

(1) L. R. 6 Eq. 91; 16 W. R. 1107.

(2) L. R. 6 Ch. 176; 40 L. J. Ch. 433; 24 L. T. 336.

sale by the liquidator under section 161 of the Companies Act, 1862, as in *Postlethwaite v. Port Philip and Colonial Gold-Mining Co.* [1889] (3), but an agreement entered into by the old company while it was a going concern; and it is such a scheme for confiscating the property of a shareholder as cannot be allowed except in strict pursuance of a statutory power.

Hughes, K.C., and A. R. Kirby, for the old company :

The validity of the proposed sale of shares is only challenged on the so-called "confiscation" clause; but the whole contract is thus impugned, although otherwise valid. The new company would have to surrender the shares to be cancelled, and that is more than can be decided on this motion. However, on the question of validity itself there is nothing illegal in giving a shareholder the choice between taking his shares and leaving them. Where there is power to sell shares either under section 161 of the Companies Act, 1862, or (as here) under the memorandum of association, a time limit for such election may be fixed, the reason being that, in order to obtain fresh capital for the development of the concern by adopting this transaction of selling to a new company, it is necessary to know whether the money will be got or not. Under section 161 there is express provision for giving the right of election to a liquidator: *Postlethwaite v. Port Philip and Colonial Gold-Mining Co.* (3) and *In re Bank of Hindustan, China, and Japan, Higgs' Case* [1865] (4). The same rule applies equally to a case of a sale under the memorandum of association. In either case the only right is to take the shares or leave them, and this provision is really a concession favourable to the shareholder who does not choose to come in, because he avoids the liability for further calls and gets what the shares may realise. There was such a sale in *Doughty v. Lomagunda Reefs, Limited* [1902] (5), and in *Burdett-Coutts v. True Blue (Hannan's) Gold Mine* [1899] (6) there was an entire exclusion of the shareholder who did not come in. All that was decided in *In re Baring-Gould and Sharpington Combined Pick and Shovel*

(3) 43 Ch. D. 452; 59 L. J. Ch. 201; 62 L. T. 60; 38 W. R. 246; 2 Meg. 10.

(4) 2 H. & M. 657; 12 L. T. 669; 13 W. R. 937.

(5) 9 Manson, 418; [1902] 2 Ch. 837; 71 L. J. Ch. 888; 51 W. R. 29.

(6) 7 Manson, 85; [1899] 2 Ch. 616; 68 L. J. Ch. 692; 81 L. T. 29; 48 W. R. 1.

Syndicate [1899] (7) was that the right to dissent cannot be taken away from the shareholder; and there is nothing contrary to our submission in the decision in *Paine v. Cork Co.* [1900] (8) that a liquidator cannot be given by the articles of association powers of sale substantially other than those provided by section 161. The decisions in both *Cotton v. Imperial and Foreign Agency and Investment Corporation* [1892] (9) and *Doughty v. Lomagunda Reefs, Limited* (5), show that the sale is totally independent of the provisions in the Act. There is no question of dissent, and a shareholder who, being bound by the memorandum, has had the same chance as any one else, cannot complain of an arrangement of this kind or call it "confiscation."

Younger, K.C., and *W. S. Eastwood*, for the new company:

To grant against us the relief which is asked—namely, that the whole contract should be held void—would inflict a great hardship, for it would involve the surrender of the property acquired without any provision for our purchase-price. Moreover, the plaintiff's delay is even longer than in *Postlethwaite v. Port Philip and Colonial Gold-Mining Co.* (8); the circulars and letters were all duly sent to his registered address, and he yet stands by for eleven months. He cannot at any rate show such jeopardy as to entitle him to obtain interlocutory relief. As to the question of law, we rely on the cases cited on behalf of the old company, and also on *Griffith v. Paget* [1877] (10) and *Booth v. New Afrikaner Gold-Mining Co.* [1902] (11), in which it appears that under a similar scheme shareholders who refused to take shares were to be entitled to no compensation.

W. F. Hamilton, K.C., in reply:

Here the transaction was not a sale for partly paid shares, as in *Booth v. New Afrikaner Gold-Mining Co.* (11), but a scheme of

(7) 6 Manson, 430; [1899] 2 Ch. 80; 68 L. J. Ch. 429; 80 L. T. 739; 47 W. R. 564.

(8) 7 Manson, 225; [1900] 1 Ch. 308; 69 L. J. Ch. 156; 82 L. T. 44; 48 W. R. 325; 16 T. L. R. 135.

(9) [1892] 3 Ch. 454; 61 L. J. Ch. 684; 67 L. T. 342.

(10) 5 Ch. D. 894; 46 L. J. Ch. 493; 25 W. R. 523.

(11) 10 Manson, 56; [1903] 1 Ch. 295; 72 L. J. Ch. 125; 87 L. T. 509; 51 W. R. 193.

arrangement between the debenture-holders and the directors which the Court ought not to sanction. The plaintiff does not claim the proceeds of the shares, but only to restrain dealing with them without making proper provision for those he claims to be entitled to. The alternative offered by the directors is just such a coercion as that imposed on a man who, having put in one shilling, is kept out because he cannot find nineteen times that amount to pay up the calls.

Cur. adv. vult.

12 July :

JOYCE, J., after stating the facts, continued : The agreement contemplated a winding up, but it is admitted on all hands that the intended sale, for reasons which I need not mention, is not in any way under the powers or provisions of section 161 of the Companies Act, 1862, which under the proviso with reference to dissenting members would have given dissenting members certain rights, as we all know. It follows, then, that the only authority, if any, for the agreement in question must be found, if at all, in the provisions of the memorandum of association of the old company, which, so far as relevant, are to the effect that the objects of the company are to acquire and work certain gold mines, and so on, and for the purposes aforesaid, so far as may be deemed necessary or expedient, to sell and dispose of, any of the property of the company, or the whole undertaking, and to accept in payment for the same money or shares, with power to distribute the same—that is, the shares—in specie, either by way of dividend or otherwise, but so that no distribution amounting to a reduction of capital can be made without the sanction of the Court. It is true that the last article of the articles of the association provides, in a certain event, that, in case of the powers of the 161st section being brought into requisition, the shares of dissenting members should be sold, and they should be paid the net proceeds. But it is pretty clear, and I think it is admitted, that that article is invalid for the reasons which appear in the two cases of *In re Baring-Gould and Sharpington Combined Pick and Shovel Syndicate* (7) and *Paine v. Cork Co.* (8), which were cited in the argument.

Therefore the question which I have to determine is whether the power in the memorandum to accept shares in payment on a sale

of the undertaking, and to distribute those shares in specie, comprises or confers an authority to sell upon the terms of this agreement of 23 July, 1903, and, in particular, upon the terms of clauses 3, 4 and 5 thereof, the 5th clause, as I have already stated, providing that the shares that would be coming to the members who refused to accept them shall be sold and applied in reduction of the purchase-money. These terms contain no such provision as in article 116 of the articles; and if they can be imposed, any refusing or dissentient member has no such right as section 161 of the Companies Act would have given him if the proceedings had been under that section.

Upon reflection I have come to the conclusion that the memorandum does not confer the requisite authority. Certainly it does not expressly authorise what is proposed, nor is such an arrangement, in my opinion, reasonably necessary for the exercise of such powers as are expressly conferred; in other words, I hold that the requisite authority is not to be found there, and, if so, it appears to me not to exist at all. This is really, as counsel for the plaintiff pointed out to me, a sale in exchange for an option to the members of the old company to take shares upon which there is a considerable liability, and which they could not be compelled to take, the alternative to refusal being the loss of the existing paid-up shares held by the refusing members. Also obviously and avowedly the whole thing is a device to compel the members among them to provide additional capital when no further call could be made. I think that is not a good device or valid in law, and the proposed mode of treating dissenting members not reasonable unless they have expressly contracted to subject themselves to such treatment.

This is said to be a case of first impression, and not covered by authority. At all events I do not see my way to hold that persons holding shares upon the terms of the memorandum and articles in question can, without their consent, be dealt with as proposed in the present case. If necessary to decide, as at present advised, I am of opinion that the agreement is *ultra vires*. Therefore, at least, I think the plaintiff is entitled to the injunction asked.

The company appealed.

Hughes, K.C., and A. R. Kirby, for the appellants :

There is no doubt that the company had power to enter into the agreement of 23 July, 1908. In the case of a clause similar to that in this agreement, it was held that the company could sell the shares of dissentient members with a view to an immediate winding up : *Burdett-Coutts v. True Blue (Hannan's) Gold Mines* (6). The memorandum of association here takes away the power of dissent from any shareholder. The sale is under the powers of the memorandum, and is not *ultra vires*, and the company is in the same position as the liquidator would be if he had sold in the course of the liquidation.

Younger, K.C., and W. S. Eastwood, for the new company, were not heard.

Hamilton, K.C., and Tindal Robertson, for the plaintiff, were not called upon.

ROMER, L.J. : After what has been said by the Court in the course of the argument, and what was said by Mr. Justice JORCE in his judgment, with which I agree, I may state very shortly indeed my reasons for dismissing this appeal.

This is not a case where what has been purported to be done is justified under section 161 of the Companies Act, 1862. That section would not justify such an agreement as we have in that of 23 July, 1908, if it had been entered into by a liquidator ; but it was not an agreement entered into under section 161 at all ; and admittedly that section does not apply. If what has been done was justified by the agreement of 23 July, 1908, then the subsequent resolutions of course would be valid enough ; but if the agreement in question was *ultra vires* of the company, then I need scarcely say that the subsequent resolutions would not make that agreement valid.

Now, how can the agreement be justified as a contract made by the company as a going concern ? It is said that it could be justified as a sale coming within one of the powers of the company conferred by clause 3 of the memorandum, sub-clause (f), and by sub-clauses (h) and (n). Now I may put the matter very shortly.

The sale contemplated by sub-clause (f) is, I need scarcely say, a sale out and out of the undertaking; and if it took place the sale would result in the assets obtained by the going company by the sale to another company being part of the capital assets of the selling company. You could not, of course, in such a sale make a contract with the purchasing company that the assets of the selling company should be divided amongst the shareholders of the selling company. You could not return capital in that way among the shareholders in a going concern.

But it is said that you can justify a provision in such a contract whereby, as in this case, it is made a term of the contract that, if a liquidation takes place, then the liquidator shall divide the assets in a particular way, and so that if a shareholder does not choose to take upon himself a particular liability which he is not bound to take upon himself, his share of the assets shall be forfeited, and the proceeds handed over to the purchasing company. To my mind, such a contract is altogether *ultra vires* of the selling company. It is not justified as a sale under sub-clause (f). The purchasing company has no right or power to make it a term of such a contract that the assets shall be dealt with in that way, nor can the selling company, under the pretended exercise of the powers of sub-clause (f), pretend to sell its assets with a special contract in favour of the purchasing company that if a liquidation takes place within a year the liquidator shall be bound to do something which otherwise the liquidator might not be bound to do; and moreover, further, that individual shareholders shall be bound to lose their share of the assets, as I have said, for the benefit of the purchasing company, if the shareholders do not choose to take upon themselves a liability which they are not bound to take upon themselves. In my opinion, such a contract as that, as I have said, is not a contract of sale and disposition at all such as is contemplated by the memorandum of association of the selling company, sub-clause (f).

I need scarcely say that if this cannot be justified as a sale under the powers conferred by the memorandum of association of the company, still less can the transaction be justified by saying, "Look at the substance of it; treat this agreement as being one with a reconstruction of the company, as one with a liquidation, all being one scheme or device; and look at the object of the scheme and

device, and see whether that in substance was not one that could be carried through." If I do adopt that view, and look at the substance of the scheme and treat it as a whole, what it comes to is this: It is a scheme whereby the shareholders of a company who have paid up their shares in full, and are not under any liability to furnish any further capital, have said to them this: "You must pay up more capital, and if you do not you shall forfeit all share and interest in this company as a going concern." I need scarcely point out that such a scheme is wholly improper and *ultra vires*.

Therefore, whether you look at it as a matter of detail or whether you look at the substance as a whole, it appears to me that equally this scheme was *ultra vires* and improper, and that the judgment of the Judge in the Court below was quite proper.

COZENS-HARDY, L.J.: I agree. In the first place, one cannot help seeing this, that the agreement of 28 July, 1903, is not an agreement conditional upon a winding-up. Upon the face of it, it contemplates that there may not be a winding-up until after twelve months, because clause 4 imposes certain obligations upon the purchasing company if the winding-up takes place within twelve months, which obligations will not rest upon them if the liquidation does not take place until after twelve months. It is also quite clear that the transaction is not one under section 161 of the Companies Act, 1862, and that, if it can be supported at all, it must be supported as falling within sub-clause (f) of the memorandum. I do not desire to go again over the ground which has been traversed by my Lord, but it seems to me to be impossible to support this agreement as a sale within the meaning of that sub-clause. The agreement is a document which purports to impose certain obligations upon the liquidator in the event of a winding-up, and to impose certain penalties upon a shareholder in the old company if and when the liquidation takes effect. It is something altogether different from a contract within the contemplation of sub-clause (f), which is a contract for a sale out and out of the whole undertaking, which may be for shares, which shares when received by the going company must be dealt with as part of the assets of the going company, or distributed in due course under the winding-up of the company. It seems to me, for the reasons which have been stated

by my Lord and indicated by Mr. Justice JOYCE, that the agreement itself is *ultra vires*, and that no rights can be claimed under it.

Quite apart from that, I only desire to express my entire agreement with the last observations of my Lord. The agreement is, as it seems to me, not one which is fair or reasonable in itself. It is an attempt to compel a shareholder to find further money or to forfeit a property which, *ex hypothesi*, is of value because our attention has been called to the notices, under which it is apparent that the company is offering those 30,000 shares for sale, and that they are shares which have a value of their own; and the proposition is really that the shares which are of value shall be realised, and the proceeds not go to the old shareholders in the company, but be put into the pockets of the new company. That, apart from the point of *ultra vires*, seems to me a transaction so unfair and so unreasonable that the Court ought not to give effect to it.

Appeal dismissed.

Solicitors: *Trinder, Capron & Co.*, for the Appellants and the new company.

Pettitt & Valentine, for the Plaintiff.

IN RE DAVID PAYNE & CO.: YOUNG *v.* DAVID PAYNE & CO.

1904, June 17, 18. C. A. VAUGHAN WILLIAMS, ROMER, AND
COZENS-HARDY, L.JJ.

Company—Debenture—Borrowing for Unauthorised Purposes—Ultra vires—Duty of Lender to Inquire—Knowledge of Director of Lending Company—Notice.

Where money is being borrowed by a company within the limits of its powers of borrowing, there is no obligation on the lender to inquire for what purposes the borrowing is made, or whether the money borrowed is to be applied for objects within the powers of the borrowing company.

Davis's Case (1), so far as it is an authority to the contrary, overruled.

Where a director of a lending company has in his private capacity acquired knowledge as to the purposes to which a borrowing company intends to apply money borrowed by it upon the security of a debenture, there is no duty in the director to disclose that knowledge to the lending company, and such knowledge will not be imputed to it so as to avoid the debenture if the purposes are improper and *ultra vires*.

THIS was an appeal from a decision of BUCKLEY, J.

On 18 February, 1902, the sum of 6,000*l.* was lent by the Exploring Land and Minerals Co., Limited, to David Payne & Co., Limited, and for that sum they received a debenture dated 20 February, 1902, for a sum of 6,250*l.*, the 250*l.* being for interest, which was to be allowed in respect of the loan.

The liquidator of David Payne & Co. (hereinafter called the company) in May, 1903, in a debenture-holders' action, took out a summons asking for a declaration that the debenture was not duly issued by the company, but was fraudulent, *ultra vires*, and void, and did not constitute a mortgage or charge upon the undertaking or assets of the company, and an order that the debenture should be delivered up to be cancelled.

The company had power to borrow for the purposes of its business by the issue of debentures, but it was alleged that the money was not borrowed really for the purposes of the company and never reached the company, and that the Exploring Land and Minerals Co. knew this when they advanced the money through one Kolckmann, who was a director of the latter company. It appeared on the evidence, mainly from the affidavit of one Johnston, an American engineer, who had assumed the control of the company,

(1) L. R. 12 Eq. 517; 41 L. J. Ch. 124; 25 L. T. 83.

that the money borrowed, or a considerable portion of it, was used for the purpose of financing certain companies called the Johnstonia Engraving Co., the Johnston Die Press Co., and the Johnston Foreign Patents Co., in which companies Kolckmann was interested. Kolckmann had suggested the loan by the Exploring Land and Minerals Co. to Bourke, the chairman of that company. He was not present at any meeting of the board of the Exploring Land and Minerals Co. which authorised the loan, but he signed the cheque for the advance, which was made payable to the solicitors of the company, and he was present at a subsequent board meeting when the lending was ratified. There was no evidence that Kolckmann disclosed the information he had as to the purpose of the borrowing to any of his co-directors of the Exploring Land and Minerals Co.

BUCKLEY, J., refused the application on the ground that if a communication is made to an agent of a corporation which it would be his duty to hand to his principals, and if that person had an interest which would lead him not to disclose to his principal the information which he had thus obtained, and in point of fact he did not communicate it, knowledge is not to be imputed to the principal by reason of the fact that the agent knew something which it was not to his interest to disclose and which he did not disclose. He therefore held that he ought not to impute to the Exploring Land Company the knowledge which Kolckmann had.

The liquidator of David Payne & Co. appealed.

Buckmaster, K.C., and Nepean, for the appellant :

The borrowing was *ultra vires*, as the company had no power to borrow money for the purpose of financing other companies. Kolckmann, being a director of the lending company, knew of the facts which made the borrowing *ultra vires*, and his knowledge must be imputed to the Exploring Land and Minerals Co. : *In re Marseilles Extension Railway Co.* [1871] (2) and *In re Hampshire Land Co.* [1896] (3). The borrowing having been for an illegal purpose, was wholly illegal between borrowers and lenders, and the

(2) L. R. 7 Ch. 161 ; 41 L. J. Ch. 345 ; 25 L. T. 858 ; 20 W. R. 254.

(3) [1896] 2 Ch. 743 ; 65 L. J. Ch. 860 ; 75 L. T. 181 ; 45 W. R. 136.

transaction was therefore void. If a company has power to borrow, the persons lending to it are bound to ascertain whether the borrowing is authorised or not by the constitution of the company: *In re Durham County Permanent Benefit Building Society, Davis's Case* [1871] (1), and *Chapleo v. Brunswick Benefit Building Society* [1881] (4). It is therefore unnecessary to prove notice to the lending company of the improper purpose. If notice was necessary, the knowledge of the agent Kolckmann will be imputed to the lending company: *Le Neve v. Le Neve* [1747] (5) and *Bradley v. Riches* [1878] (6). It was Kolckmann's duty to tell his principal, the Exploring Land and Minerals Co., all about the security and the fact of the borrowing being *ultra vires*. If there was an obligation to disclose this, disclosure will be presumed, though it was the agent's interest not to disclose: *Kettlewell v. Watson* [1882] (7). The effect of non-disclosure does not matter.

Upjohn, K.C., and *Jessel*, for the appellants, were not called upon.

VAUGHAN WILLIAMS, L.J.: I think that the decision of Mr. Justice BUCKLEY in this case was quite right, and that this appeal must be dismissed. Counsel for the appellants have said everything that can be said in the case, but at the same time they have not convinced me. They argued that this transaction was *ultra vires* altogether—that it was just as if this transaction was a lending to a company with a limited borrowing power in excess of the amount authorised by the power. But they were compelled to abandon that first attack on the judgment of Mr. Justice BUCKLEY, because really, in the face of *In re Marseilles Extension Railway Co.* (2), it was impossible to maintain that proposition. The whole inquiry which was there entered into by the Court as to the knowledge of the lending company would have been absolutely immaterial if this transaction was *ultra vires* in such a sense that nothing could make it right. We can therefore get rid of that contention.

(4) 6 Q. B. D. 696; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529.

(5) 2 Wh. & Tud. L. C. 175; Amb. 436.

(6) 9 Ch. D. 189; 47 L. J. Ch. 811; 38 L. T. 810; 26 W. R. 910.

(7) 21 Ch. D. 685; 51 L. J. Ch. 281; 46 L. T. 83; 30 W. R. 402.

Then, assuming that the appellant has to prove the knowledge of the lending company here that the money was going to be applied to an improper purpose, how is it sought to prove that? It is attempted to prove it by saying that Kolckmann knew it; that Kolckmann was a director of the lending company; that he was acting in this matter; and that, as he knew it, it must be taken that the company knew it. Attention is called to the fact at the moment that Kolckmann became aware, if he ever did become aware, that the money was intended to be applied for purposes outside the memorandum of association, Kolckmann was, in fact, though a director of the lending company, yet not purporting to act as such director. But then it is said, "True, but it is not necessary that the agent should have acquired the knowledge at the time when he is acting as agent. It is sufficient if he afterwards acts as agent in respect of the matter as to which he acquired the knowledge. It thereupon becomes his duty to communicate to the company for which he is then acting the knowledge which he has previously acquired." *Bradley v. Riches* (6) and *Kettlewell v. Watson* (7) are cited in favour of that proposition. I entirely agree; but those cases have no application at all to the present case, because, in my opinion, at the moment when Kolckmann began acting in any way on behalf of the lending company the transaction was of such a nature that there was no obligation on the part of the lending company to inquire to what purpose the borrowed money was going to be applied, and there was no obligation upon Kolckmann to receive or disclose any such information. I believe I correctly laid down the law in *In re Hampshire Land Co.* (8) when I said, "It seems to me that, broadly, the Lords Justices do draw the line thus, that the knowledge which has been acquired by the officer of one company will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice." To my mind the proper inference in this case is that there was no duty on the part of Kolckmann to receive any information on account of his company as to how this money was going to be applied. It was not the duty of his company to make any inquiries on that

subject, nor was it the duty of the directors of the company to receive any information. That is the inference I draw here from the facts. The fact is that Kolckmann at some meeting, when he was acting in his own interest entirely, and not as director, discussed with some people how some money could be raised, and it was then suggested that an application should be made to the Exploring Land and Minerals Co. to lend this money upon security of a debenture of David Payne & Co. The application is made; the matter is introduced to the lending company through the medium of Kolckmann. Under these circumstances the money is lent on the authority of Bourke, the chairman of the lending company, Kolckmann actually signing the cheque; and these two acted in this matter without any direct authority of the company. Therefore they acted in an unauthorised manner. But then a fortnight later the matter is brought to the attention of the board. I do not know whether there was any other director present at this meeting, but the lending of the money was ratified. In my opinion it would be altogether wrong to impute to the Exploring Land and Minerals Co. the knowledge which came to Kolckmann at the time when the meeting to which I have referred took place. To my mind there is no evidence here to show that Kolckmann ever professed to act on behalf of the company until he drew this cheque, which was to be exchanged for the debenture. It is said that they ratified Kolckmann's negotiation. I think they only ratified it so far as he was professing to act on behalf of the Exploring Land and Minerals Co. Under these circumstances I see no ground on the facts for imputing Kolckmann's knowledge to the company. I therefore think that this debenture is a good security in the hands of the lending company.

I wish to make one observation about *Davis's Case* (1). The report is not very precise; but if that case is really an authority for the proposition that the application of money borrowed within the borrowing powers of the company for purposes not authorised by the memorandum makes the transaction invalid and the security given to the lender a nullity, merely because there was an intention on the part of the borrowing company to apply the money for an improper purpose, although the lending company might have had no knowledge whatever that the money was to be applied for that

improper purpose, I think that *Davis's Case* (1) is wrong and cannot be reconciled with subsequent authorities.

ROMER, L.J.: I have come to the same conclusion. In the first place, where you have a limited company with a memorandum of association authorising the company to embark on a series of transactions, if among those purposes you find a power to borrow generally for the purposes of the company, I take it to be clear beyond controversy at the present day that when money is being borrowed within the limits of the power of borrowing as to amount the person who lends the money is not bound to inquire to what purposes the borrowing company is about to apply the money so borrowed; and if *Davis's Case* (1) is an authority to the contrary I cannot agree with it. It may be that that case may turn on some point which does not appear in the report, and which is not clear to me as at present advised.

The only other question is as to imputed notice. I take it that there was a transaction between the Exploring Land and Minerals Co. and David Payne & Co. of this kind. The first company lent 6,000*l.* secured by a debenture of the second company. Now that transaction was not *ultra vires* the second company. But there was some evidence to show that it was intended by some of the directors of the borrowing company to apply the money for purposes not authorised and altogether improper *quâ* the borrowing company. Now one director of the lending company knew how that money was going to be applied. He acquired that knowledge through some conversation which he had with some people in his capacity before that transaction was carried out by the lending company. The question is whether, inasmuch as that director took part on behalf of his company in authorising the lending of the money and the acquisition of the debenture, and assisted in carrying out that transaction, the knowledge of that director as acquired is to be considered the knowledge of the lending company. Is that knowledge, as a matter of law, to be imputed to the lending company? In my opinion no such notice can be imputed at law. I take it that in such a transaction the lending company was not bound to inquire as to the application of the money at all by the borrowing company. That being so, it appears to me that knowledge

independently acquired by a director in his personal capacity in respect to a matter which was irrelevant so far as concerned the lending company is knowledge which cannot be imputed to the company, for it was knowledge of something which really did not concern the lending company as a matter of law. Therefore you cannot imply a duty on the part of a director to have told these facts to the lending company or a duty on the part of the lending company to have inquired into that question. The lending company not having any reason to know how the money was to be applied apart from the knowledge of the director, it would have been wholly improper for the agent of that company to have inquired as to the application of the money. That being so, there was no legal duty on the director to impart his knowledge, nor any duty on the part of the lending company to have acquired the knowledge. Apart from the knowledge of the director, it is not established that any knowledge in fact was proved against the lending company.

COZENS-HARDY, L.J. : I am of the same opinion. There is one point, as to whether a person lending money to a company is in danger of losing his security if the company intended to devote the money to improper purposes, as to which I should like to add a few words. I do not think the point can be put better than it has been by Mr. Justice BUCKLEY. He says, "Where the power is merely a general power to borrow, limited only, as it must be, for the purposes of the company's business, I think the matter is to be treated in this way, that the lender cannot investigate what the borrower is going to do with the money ; he cannot look into the affairs of the company and say, ' Your purposes do not require it now ; this borrowing is unnecessary ; you must show me exactly why you want it,' and so on." That statement of the law being entirely consistent with recent authorities, it seems to me to follow that *Davis's Case* (1) cannot be relied on as laying down any principle of law upon which we ought to act. There may have been some circumstances which would justify the decision not to be found in the report, but otherwise I am of opinion that that decision is wrong.

As to imputed notice, the ground has been so completely covered

by Lord Justice ROMER and by *In re Marseilles Extension Railway Co.* (2), and *In re Hampshire Land Co.* (3), that I do not think I should be doing any useful service by adding anything. I will only say that if I took a different view of the law I should hesitate to place complete reliance on Johnston's evidence.

Appeal dismissed.

Solicitors: *Blundell, Gordon & Co.*, agents for *Gordon, Hunter & Macmaster*, Bradford, for the Appellants.
Willis & Willis, for the Respondents.

TRECHMANN *v.* CALTHORPE; DE LA COUR *v.*
 CLINTON; TAIT *v.* MACLEAY.

1904, July 16, 18, 19, 20, 21, 26. C. A. VAUGHAN WILLIAMS,
 ROMER, AND COZENS-HARDY, L.JJ.

Company—Prospectus—Material Contract—Omission—Duty of Director—Liability
—Companies Act, 1867, s. 38.

Where a director has issued a prospectus knowing that there might be contracts material to be stated under section 38 of the Companies Act, 1867, and took no trouble to ascertain the facts, but left the matter to the company's solicitor, his responsibility under that section is not evaded by the fact that he may truthfully say that when he approved the prospectus he had in fact forgotten the existence of a particular contract which was material to be stated. It is not necessary for the plaintiff to show that the director's attention was deliberately and consciously directed to a particular contract which he then omitted to mention.

The duties and responsibilities of a director under section 38 considered, and the ruling of COCKBURN, C.J., in *Twycross v. Grant* (1) explained.

THESE were three appeals by the defendants in the first two actions from the decision of JOYCE, J., and by Sinclair MacLeay, the defendant in the third action, from the decision of KEKEWICH, J., declaring in each case that the prospectus of the Standard Exploration Company must be deemed fraudulent on the part of the respective defendants by reason of its not having specified the date of and names of the parties to an agreement dated 27 October, 1898, made between the London and Globe Finance Corporation and the Standard Exploration Company, whereby the corporation agreed to transfer to the

(1) 2 C. P. D. 469; 46 L. J. C. P. 636; 36 L. T. 812; 25 W. R. 701.

company 5,000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Limited, and the company agreed to allot and issue to the corporation 40,000 shares of the company in exchange therefor.

The Court of Appeal affirmed the judgments appealed from on this point, holding that the contract in question was material, that it was not covered by a waiver clause, and that the plaintiffs had proved sufficient damage to entitle them to an inquiry. The appeals in the first two actions do not call for any report. The appeal in the third action was argued immediately after, but separately from the appeals in the first two actions, the appellant's case raising this additional feature, that at the time when he, as director, approved the prospectus, he had in fact totally forgotten the agreement in question.

The facts relating to this appeal were as follows :

The defendant Sinclair MacLeay was appointed one of the first directors of the Standard Company, and the following extracts from the minute-book of the company were relied on by the plaintiff as fixing the defendant with knowledge of the agreement of 27 October, 1898.

At a board meeting held on 26 October, 1898, at which Lord Donoughmore (the chairman) and the defendant were present, the solicitor of the company submitted an agreement in five parts between the London and Globe Finance Corporation, Limited, of the one part, and the company of the other part, providing for the acquisition by the company of the 5,000 fully paid-up deferred shares in the undertaking known as the Austin Friars Finance Syndicate, Limited, in consideration of the 40,000 fully paid-up shares of the company, and it was resolved that the seal of the company be affixed thereto, and the agreement remitted to the London and Globe Finance Corporation for execution, and that thereafter the same be filed with the Registrar of Joint-Stock Companies.

At a board meeting held on 27 October, 1898, at which Lord Donoughmore (the chairman) and the defendant were present, the minutes of the previous meeting of 26 October, 1898, were read and signed by the chairman, and the company's solicitor reported that the agreement with reference to 40,000 fully paid shares of the

company to be allotted to the London and Globe Finance Corporation, or its nominees, sealed at the previous board meeting, had been duly filed, and that such shares could be allotted. The secretary also produced a letter from the London and Globe Finance Corporation requesting such allotment to be made to certain nominees, and it was resolved that such allotment be made and that 40,000 shares, the numbers of which were specified, be, allotted to the nominees, such shares being credited as fully paid up, and that the secretary be authorised to prepare and despatch letters of allotment accordingly.

At the next board meeting, held on 12 May, 1899, at which six directors of the company were present, including Whitaker Wright (the chairman) and the defendant, the minutes of the previous meeting of 27 October, 1898, were read and signed as a correct record of the proceedings at such meeting; and the draft prospectus was submitted by Whitaker Wright, and it was resolved that the same be approved subject to indorsement by the company's solicitors, and that the secretary be authorised to issue the same and receive subscriptions for 500,000 shares.

Notwithstanding these minutes, the defendant swore that in point of fact he had at the meeting of 12 May, 1899, when the prospectus was approved, totally forgotten the agreement referred to in the minutes, that he did not attend to the reading of the former minutes at the meeting of 12 May, and that the agreement was not in fact present to his mind on that occasion; and both KEKEWICH, J., and the Court of Appeal accepted his evidence in this respect as true; but the Court considered that he was aware that there might be contracts requiring to be stated under section 38 of the Companies Act, 1867 (2), that he took no steps to ascertain

(2) Companies Act, 1867, s. 38 (now repealed by the Companies Act, 1900, s. 33):

"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such pro-

spectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus unless he shall have had notice of such contract."

whether this was so or not, and was content to leave it entirely to the solicitor of the company.

KEKEWICH, J., gave judgment for the plaintiff with costs. As to the agreement of 27 October, 1899, his Lordship held that it ought to have been and was not disclosed, and that therefore *primâ facie*, as the defendant was a director of the company and took part in the issue of the prospectus, he must be held liable under section 38, and continued: "'But,' he says, 'I did not knowingly issue the same, and the construction I put on the section, which is not denied on the other side, is that "knowingly" means knowing of the contract which ought to have been disclosed and which is not disclosed.' He says, 'I did not know of the contract; I had entirely forgotten it; it was not present to my mind on 12 May, 1899, when I approved the prospectus. Therefore I cannot be said to have issued the prospectus knowing of this contract.' Now I have already said that in my opinion it may well be that total forgetfulness is equivalent to total ignorance. I am aware that any question of that kind transcends ordinary discussion and tends to pass into the sphere of metaphysics, but still I think that it is quite possible for a man to excuse himself with reference to his acts by saying that, though weeks, months, or years ago something was brought to his mind, it had, to use a vulgar expression, escaped his memory, and he was entirely ignorant of it. I am not prepared to say that that is a plea which is impossible at law, but it is one which must be regarded with reference to all the facts. The contract in question was one entered into by the Standard Company, of which the defendant was a director, and it had been approved on behalf of the Standard Company at a meeting of directors at which the defendant was present. He explains that he was summoned by telegram and found the matter all cut and dried and did not go into it, but as a matter of fact he did approve of this very contract, and I am told that it was brought up on some other occasion, but I am content with the one when the document was approved. More than that, at a meeting of 12 May, 1899, according to the ordinary rules of business, the minutes of the last meeting were read and signed; and though it is quite possible that the defendant did not attend to that which to my mind is an extremely important part of the meeting, though

often regarded as a perfunctory matter, he cannot be heard to say that he sat there and did not hear attention called to this very contract which he had himself approved at the former meeting. It seems to me that, whatever may be right to say, under other circumstances in a different case, respecting ignorance and forgetfulness being equivalent, it is impossible to allow that in a case like this, where the forgetfulness was really due to the man's own neglect. He cannot be allowed to say, 'I sat there and did not hear the reference to this document, and therefore I had forgotten it.' I must therefore hold that he knowingly omitted to state this contract on the prospectus."

The defendant appealed.

Gore-Browne, K.C., and Ashton Cross, for the appellant :

The evidence is that the defendant did not attend to the minutes of 27 October, 1898, being read at the board meeting of 12 May, 1899, and that he had in fact totally forgotten the contract in question. There is no case of estoppel in favour of the plaintiff.

The true test of liability under section 38 is deliberate omission as to something the director knew at the time. If (as KEKEWICH, J., finds) the defendant had forgotten something he once knew, there is no such omission and no liability under the section. The Directors' Liability Act, 1890, raised no doubt a new standard of liability, altering the law in *Derry v. Peek* [1889] (3), but section 38 of the Companies Act, 1867, must not be regarded from that point of view. Section 38 creates a criminal as well as a civil liability, and the director could be indicted for a misdemeanour.

[VAUGHAN WILLIAMS, L.J. : No. It only enacts that certain acts shall be deemed fraudulent between certain parties.]

The ruling of COCKBURN, C.J., in *Twycross v. Grant* [1877] (1), shows that the defendant cannot be made liable if the view of KEKEWICH, J., on the evidence is treated as correct.

They also cited *Watts v. Bucknall* [1903] (4).

(3) 14 App. Cas. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148.

(4) 10 Manson, 176; [1903] Ch. 766; 72 L. J. Ch. 447; 88 L. T. 845; 51 W. R. 433; affirming *Byrne, J.*, 9 Manson, 426; [1902] 2 Ch. 628; 71 L. J. Ch. 903; 87 L. T. 428; 51 W. R. 44.

[VAUGHAN WILLIAMS, L.J., referred to *In re Gommersall* [1875] (5).]

W. Higgins (Hughes, K.C., with him), for the respondent.

[VAUGHAN WILLIAMS, L.J.: The argument against you is that the defendant did not do it "knowingly" if the contract was not present to his mind.]

That is too narrow a view of the section. If the defendant knew there were or might be contracts material to be stated, and omitted all inquiry, the fact that he may have forgotten the particular contract will not save him. *Watts v. Bucknall* (4) entirely governs the present case. Section 38 does not create any criminal liability.

26 July.

Their Lordships, after giving judgment in *Trechmann v. Calthorpe* and *De la Cour v. Clinton* affirming the judgment of JOYCE, J., proceeded to give judgment on the third appeal.

VAUGHAN WILLIAMS, L.J.: This case has been argued before us on both sides on the basis that it differs from the two cases in which we have delivered judgment only in this, that the defendant in this action sets up a defence which was not set up by the defendants in the other actions.

The evidence generally taken in the two first-mentioned actions was taken by consent as if given in this action, and therefore all we have to do in this action is to consider the nature of this additional defence and the evidence given by the defendant in support of it. The defendant pleads (*inter alia*) in his amended defence that "in any case he did not 'knowingly' issue a prospectus not disclosing such contracts"—namely, the contracts mentioned in the statement of claim; and in the argument the contract of 27 October, 1898, was treated as the only contract to which the Court need address its

(5) 1 Ch. D. 137; 45 L. J. Bk. 1; 33 L. T. 483; 24 W. R. 257; affirmed in H.L. *sub nom. Jones v. Gordon*, [1877] 2 App. Cas. 616; 47 L. J. Bk. 1; 37 L. T. 477; 26 W. R. 172.

attention. [His Lordship referred to the defendant's evidence and continued:]

Now it is common ground in this case that MacLeay is to be considered as a witness of truth, and that his statements are to be accepted, as far as they go, as true in fact. But what is the substance of his evidence? I do not think that it comes to more than this, that the particular contract of 27 October, 1898, was not present to his mind on 12 May, 1899. He nowhere states that it was not generally present to his mind that there had been a purchase by the Standard Company from the London and Globe, or even that it was not present to his mind there had been a contract of some sort between the Standard Company and the London and Globe in respect of the Austin Friars Syndicate. Moreover, MacLeay makes it clear that he contemplated that there might be some contracts which might not be inserted because the solicitor did not consider the contract as necessary or material. Such being the general knowledge of MacLeay, I am not prepared to hold that because he had not present to his mind the particular contract of 27 October, 1898, he had not present to his mind generally that there was some contract between the Standard and the London and Globe as to the Austin Friars Syndicate and its property or shares. Nor am I prepared to hold that he was not content that such contract should be omitted if the solicitor was of opinion that as a matter of law it was not so material a contract as to necessitate its insertion in compliance with section 38 of the Act of 1867. I therefore come to the conclusion that the prospectus was "knowingly" issued by MacLeay with a general knowledge of the existence of contracts within the section, and that he was content that such contracts should be omitted if the solicitor thought for any reason that it was not necessary to insert them or refer to them in the prospectus, and that the case is brought within the definition of Chief Justice COCKBURN in *Twycross v. Grant* (1) of "knowingly issuing," which runs thus: "'Knowingly issuing' means neither more nor less than issuing with the knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." It is not necessary that there should be a conscious fraud on the part of the defendant to render him liable to be sued under the provisions of

section 38 of the Act of 1867. Omission because the defendant was advised that a particular contract did not require, as a matter of law, to be specified will not afford ground of defence. This is *Twycross v. Grant* (1). Neither will omission be left to the discretion of the solicitor.

I have felt it necessary to express my opinion upon this additional defence which is raised by MacLeay, but as a matter of course the judgment given in the other cases applies against him. The only question is whether he can escape from the effect of this judgment on the ground of his having forgotten this contract of 27 October, 1898. My judgment is that he cannot, and therefore the appeal must be dismissed, and in effect the judgment delivered in the other case will also be judgment in this case.

ROMER, L.J.: This case is governed by our former decision except as to one further point raised on behalf of the defendant. That point depends upon this: He says that at the time when the prospectus was settled and agreed to by him on 12 May, 1899, and first issued, he did not remember the contract of 27 October, 1898. Now with reference to that point I should like to make a few observations about the general effect of section 38. That section is divided into two parts, and the earlier part says that "every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify" particulars of the contracts mentioned. These contracts are very numerous, as stated. Now with regard to that part of section 38, noticing its imperative terms, I think it follows from it that a director who is settling and issuing a prospectus has a duty cast upon him to see that the provisions of this section are complied with—a duty at any rate to take reasonable care to comply with the section. When one comes to the second part of the section it is very general indeed so far as the mere wording is concerned, for it says that "any prospectus or notice not specifying the same"—that is, the dates and the names of the parties to the contracts above referred to—"shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus unless he shall have had notice of

such contract." Now it will be observed that the second part of section 38 only speaks of "knowingly issuing the same"—that is to say, knowingly issuing a prospectus; so that, so far as the wording is concerned, the effect of that section might be very wide and far-reaching indeed if no limitation were put upon it, for a man who issues a prospectus of course knowingly issues it in one sense; and if the mere wording of the section were looked at it would follow that if the prospectus as issued, and knowingly issued, did not comply with the earlier part of the section, then it would be deemed fraudulent against the officer issuing it. But it was soon apparent to the Courts that the very large wording of the section, if I may so express it, in the latter part ought to receive some narrowing in order that justice might be done. Take a typical example to show this. Take the case of a director who really does his duty and tries to comply with section 38. Take it that he inquires into what contracts there are which might fall within section 38, and properly discharges his duty in seeking to ascertain what those contracts were in existence which ought to be set forth. But suppose that, having done his duty in that respect, the result is that he is not informed of and does not ascertain the existence of a particular contract. It could not be that the legislature intended that he should be made liable merely because the prospectus did not set forth that particular contract under the circumstances indicated. Now I think it was a consideration of cases like that which I have just mentioned which made the Judges in some cases, and particularly Chief Justice COCKBURN in *Twycross v. Grant* (1), state that "knowingly issuing" in section 38 means issuing with a knowledge of the existence of contracts within the section and intentional omission of them from the prospectus. But those statements must be taken with reference to the facts of the particular cases which the Judges who made those statements were considering; and I do not think that those statements are to be taken as giving a complete interpretation of the section applicable to all possible cases. Take, for example, the following case to show what I mean. Suppose that a director knows generally that there are contracts in existence which have been entered into by the company, and which may or may not fall within section 38, but does not choose, in the discharge

of his duty under the earlier part of the section, to inquire into those contracts at all, so that he may truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, would that absence of inquiry and consequent ignorance excuse him from liability under section 38 if it turned out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had taken the trouble to make proper inquiries and to discharge his duty under section 38? In my opinion he would not be so excused. I think that, after such a neglect of his duty to endeavour to comply with the earlier part of the section, he could not say that he had no knowledge of the existence of the contracts in question, which were not set out, so as to hold him free from liability under the section.

Those general considerations bring me now to consider the circumstances and evidence in the present case. It is clear that the defendant knew there were contracts made by the company which it might be material to set forth in order to comply with section 38. What did he do under those circumstances? The conclusion which I have come to upon the evidence is that in substance he made no inquiry as to what those contracts really were. He left it to the solicitor of the company to say which of the contracts in question were material to be set forth and to see them sufficiently and properly set forth in the prospectus. He really took no other trouble in reference to section 38. It is to be noticed that when he attended the meeting of 12 May, when the prospectus was considered, he had not previously made any inquiry into the details of the proposed prospectus, and at the meeting he did nothing to discharge his duty with regard to section 38 except to ask the solicitor, or to hear the solicitor asked by the other co-directors, whether he (the solicitor) had taken care to see that all contracts that ought to be set forth in the prospectus were there properly set forth. [His Lordship referred to the evidence of the defendant, and continued:] Under these circumstances his allegation of not remembering appears to me to be a mere irrelevant and useless excuse. The fact is, he made no inquiry into the contracts, and that was the reason why this contract was not set forth. If he had

inquired into the contracts for the purpose of complying with the earlier part of section 38, and doing his duty, there is no reason, so far as I can see, for believing that this contract of October would not have been brought to his attention for consideration in connection with that section, even if it had not been previously present to his memory. But the fact was that he thought everything should be left to the solicitor, and accordingly he never exercised his memory one way or the other—he never tried to remember. He can no more be said to have ceased to remember this particular contract of 27 October, 1898, than to have ceased to remember any other of the contracts. His want of memory in this respect had nothing to do in fact with the form this prospectus took with reference to the provisions of section 38. He left it to the solicitor entirely, and if the solicitor did, as may be the case, after conferring with Whitaker Wright, choose improperly to keep that contract out of the prospectus, this defendant cannot say that he was excused by the action of the solicitor under the circumstances. It appears to me that this defendant “knowingly issued” this prospectus within the meaning of those words as used in section 38 and is responsible for it, and that his present and particular excuse wholly fails. I think therefore that his special point does not avail him.

COZENS-HARDY, L.J.: This appeal raises all the questions which have been dealt with in *Trechmann v. Calthorpe* and *De la Cour v. Clinton*, but, in addition, one point was strenuously argued. The defendant MacLeay, the appellant, was actively concerned with Whitaker Wright in the negotiations which resulted in the taking over by the Standard of some companies of which he was director. He was one of the first directors of the Standard. He was present at the first meeting of the board in October, 1898, when the Austin Friars contract was approved and adopted on behalf of the Standard. He was also present at the second board meeting, at which the 40,000 shares, the consideration for that contract, were allotted to the London and Globe or its nominees. He was present at the third meeting—namely, on 12 May—at which minutes of the previous meeting were read and confirmed, but he says that, although undoubtedly at one time he knew of the Austin Friars contract, he had in truth and in fact forgotten all about it when the prospectus

was approved on 12 May, and that therefore he is not liable, because he did not "knowingly issue" the prospectus. He relies upon a passage in the judgment of Chief Justice COCKBURN in *Twycross v. Grant* (1): "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." That statement of the law was entirely adequate for the case before the Court, though it may not be an exhaustive definition. I do not think that the word "intentional" can be regarded as strictly accurate if it imports that a director cannot be liable unless his attention is deliberately and consciously directed to a particular contract which he then purposely omits to mention. I accept the judgment of BYRNE, J., in *Watts v. Bucknall* (4) as correct. The evidence satisfies me that the defendant, who unquestionably knew there were some contracts which ought to be mentioned, left all matters relating to the contracts to Simmons, the solicitor. He made no inquiry about the contracts. He did not attempt to discharge the statutory obligation imposed by the first part of section 38. He simply abstained from inquiry. In other words, he knowingly issued the prospectus without addressing his mind to the consideration of the question what contracts ought to be noticed. A man cannot properly be said to forget a matter to the existence of which he has not directed his attention. I think, therefore, that Mr. Justice KEKEWICH's judgment should be affirmed in substance and the appeal dismissed with costs.

[The judgment of KEKEWICH, J., was modified in some other respects not material to this report, but the Court declined to interfere with the order of the learned Judge as to costs.]

Solicitors: *Gilbert Robins ; Lesser & Danger.*

DIGEST OF CASES REPORTED IN THIS VOLUME.

I. BANKRUPTCY AND BILLS OF SALE CASES.

BANKRUPTCY.

	PAGE
ACT OF BANKRUPTCY— <i>Defective Bankruptcy Notice—Insertion of more than one Judgment Debt in Same Notice—Amendment—Bankruptcy Act, 1883, s. 4, sub-s. 1 (g); s. 143.</i>	

A bankruptcy notice was defective by reason of its being based upon two judgment debts:—

Held, that the Court ought not to allow the notice to be amended.

Decision of CAVE, J., in *In re Collier, Ex parte Dan Rylands*, followed and applied. *In re O. C. S.* 122

— *Notice of Suspension. In re Reis, Ex parte Clough* 229

APPEAL FROM COUNTY COURT— <i>Amount not exceeding 50l.—Leave to Appeal—High Court—Jurisdiction—Bankruptcy Appeals (County Courts) Act, 1884, s. 2—Bankruptcy Rules, 1886 and 1890, r. 129.</i>	
--	--

As the word "Court" in Bankruptcy Rule 129 means the original Court exercising jurisdiction in bankruptcy, an appeal cannot be brought from the order of a County Court relating to property not exceeding 50l. in value except by leave of that Court, and the High Court cannot give leave to appeal when it has been refused by the County Court. *In re Everson, Ex parte Official Receiver* 339

BANKRUPTCY ACT, 1869 (32 & 33 Vict. c. 71)—

s. 12	139, 229
s. 31	229
s. 49	229
s. 54	22

BANKRUPTCY ACT, 1883 (46 & 47 Vict. c. 52)—

s. 4, sub-s. (1) (g)	5, 122
s. 6	264
s. 8	1
s. 20, sub-s. (1)	342
s. 44	347
— sub-s. (2) (iii.)	256
s. 47	18, 229
s. 49	229

	PAGE
BANKRUPTCY ACT, 1883—continued.	
s. 55, sub-s. (6)	151
s. 80	268, 345
s. 102, sub-s. (1)	151
s. 106	270
s. 108	270
s. 112	270
s. 125	270
s. 143	122
Sched. I., r. 10	272
Sched. II., r. 13	272
r. 14	272
r. 22	130
BANKRUPTCY ACT, 1890 (53 & 54 Vict. c. 71)—	
s. 8, sub-s. (2)	125, 134
s. 13	151
BANKRUPTCY APPEALS (COUNTY COURTS) ACT, 1884 (47 & 48	
<i>Vict. c. 9)—</i>	
s. 2	339
BANKRUPTCY NOTICE, DEFECTIVE	122
BANKRUPTCY RULES, 1886 and 1890—	
rr. 12, 16	345
r. 136	5
rr. 225—229	130
r. 240, sub-r. (3)	125
r. 129	339
r. 192	342
r. 244	134
r. 285	268, 345
r. 287	345
r. 292	268, 345
Form 6	5
— 63A	125
CAPITAL, REDUCTION OF. See REDUCTION OF CAPITAL.	
CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45	
<i>Vict. c. 41)—</i>	
s. 52, sub-s. (1)	347
DEBTORS ACT, 1869 (32 & 33 Vict. c. 62).—	
s. 12	139
DISCHARGE—Conditional on Bankrupt Consenting to Judgment—Refusal	
<i>to Consent—Re-hearing—Bankruptcy Act, 1890, s. 8, sub-s. 2—Bank-</i>	
<i>ruptcy Rules of 1886 and 1890, r. 240, sub-r. 3—Form 63A.</i>	
The bankrupt was a captain in the army with no means but his	
pay, and his insolvency was due to damages given against him in an	

action for breach of promise of marriage, the plaintiff being the only creditor. The Registrar made an order for the bankrupt's discharge on condition of his consenting to judgment for 600*l.* being entered against him, to which he refused his consent. On a re-hearing of his application for a discharge under Rule 240, sub-rule 3, the Registrar substantially repeated his former order. The bankrupt appealed, and asked for an order suspending his discharge for two years only under section 8, sub-section 2 (ii.) :—

Held, that, though the bankrupt was not entitled to such an order as of right, it was a proper order to make under all the circumstances of the case. *In re Gaskell, Ex parte Gaskell*

125

DISCHARGE—Consent to Judgment—Payable by Annual Instalments—Modifications—Bankruptcy Act, 1890, s. 8, sub-s. 2—Bankruptcy Rules, 1886 and 1890, r. 244.

An application to the Court after the expiration of two years from the date of an order of discharge under the Bankruptcy Act, 1883, s. 28, sub-s. 2, to modify the terms of the order, should be made by the bankrupt, and not by the trustee.

The bankrupt is not disqualified from making such an application by the mere fact that he has failed to comply with the requirements of Rule 244 of the Bankruptcy Rules, 1886 and 1890, requiring him to render accounts of his after-acquired property.

The Court will modify the terms of the order for the bankrupt's discharge where on the evidence there is no reasonable probability of his being in a condition to comply with the terms of the order originally made. *In re John Roberts & Co., Ex parte Bonzoline Manufacturing Co.*

134

DISCLAIMER—Lease—Mortgage by Sub-demise—Vesting Order—Merger—County Court—Jurisdiction—Bankruptcy Act, 1883, s. 55, sub-s. 6; s. 102, sub-s. 1—Bankruptcy Act, 1890, s. 13.

A Court of Bankruptcy is entitled to exercise a judicial discretion, and does not merely act ministerially, in dealing with applications for vesting orders under the provisions of section 55, sub-section 6, of the Bankruptcy Act, 1883.

The lessee of certain freeholds mortgaged his term to the plaintiff by way of sub-demise to secure certain advances. He subsequently acquired the fee-simple of the premises, and ultimately sold it to the defendant. Afterwards the lessee became bankrupt, and his trustee duly disclaimed the lease under the provisions of section 55 of the Bankruptcy Act, 1883. The defendant thereupon moved the County Court in the bankruptcy, under the provisions of sub-section 6 of section 55, for an order that the mortgagee should take a vesting order of the lease; or that, on the failure of the mortgagee to take such vesting order, the mortgagee shall be excluded from all security upon the lease, and that the lease should thereupon be vested in the defendant freed from all incumbrances. The mortgagee declined to accept a vesting order, on the ground that the lease had merged in the fee-simple on the conveyance of the fee-simple to the lessee, and

that it was not, accordingly, any longer subsisting, and could not therefore be the subject of a vesting order. The Registrar decided on the particular facts of the case that the lease was still subsisting; and he made an order excluding the mortgagee from all security in the said lease, and vesting it in the defendant freed from all incumbrances. The mortgagee had not appealed from this order.

The mortgagee claimed in the present action that he was entitled to the incumbrance upon the lease created by his mortgage by way of sub-demise:—

Held, that the County Court possessed jurisdiction under section 102, sub-section 1, of the Bankruptcy Act, 1883, to adjudicate upon the question of merger; that, the County Court having already so adjudicated, the question was now *res judicata*, and could not be re-opened, and that the mortgagee had accordingly lost his security.

Held, also, on the particular facts of the case, that there had been no merger. *Lea v. Thursby*

151

FRAUDULENT DEBTOR—*Assignment for Benefit of Creditors*—*Quitting England with Property divisible among Creditors*—“*His Property*”—*Debtors Act*, 1869, s. 12.

A debtor executed a deed of assignment for the benefit of his creditors, whereby he conveyed and assigned all his property, including sums of money, to a trustee upon trust to sell, and out of the money coming to his hands by the ways and means aforesaid to pay himself the cost of carrying the deed into effect, and then to distribute the same among the creditors of the debtor as therein provided. The deed was executed by the debtor and by the trustee, but was not executed by or communicated to any of the creditors. Except a sum of 161*l.*, which the debtor had in his possession at the date of the deed and which he retained, the trustee took possession of the debtor's effects and carried on his business. Soon afterwards the debtor quitted England, taking with him 120*l.*, part of the sum of 161*l.* Within four months afterwards he was adjudicated a bankrupt:—

Held, that the 120*l.* was “part of his property” which ought by law to be divided amongst his creditors within the meaning of section 12 of the Debtors Act, 1869, and that he was rightly convicted of a felony under that section.

Reg. v. Creese distinguished. *Rez v. Humphris* 139

GAMING ACT, 1892 (55 & 56 Vict. c. 9) 148

INSURANCE—*Underwriting at Lloyd's*—“*Names*”—*Bankruptcy of Underwriter*—*Right to Books*.

Prior to his bankruptcy the debtor carried on business as an underwriter at Lloyd's on his own account and as agent for four other persons or “names.” By agreement with each of the “names” it was provided that proper underwriting and account books should be provided and kept, and be always open to the inspection of the “name,” and the “name” should pay to the debtor an annual sum as a remuneration for his services in conducting the business, for

keeping and providing books and papers, and for providing an office and clerks, and other outgoings. The debtor kept ledgers in which was a separate column for the transactions done for each "name," and another for his own transactions in respect of the same matters. At the date of the bankruptcy the books were in the hands of a firm of accountants who, on instructions from the "names," declined to deliver them up to the trustee in the bankruptcy:—

Held, that the inference from the agreements was that the debtor and the "names" were all interested in the books, and the debtor's agency having come to an end he had no greater right to the books than the "names," and his trustee had no right to the exclusive possession of them; but that the "names" must undertake to give the trustee such inspection of the books and facilities for making extracts from them as might be reasonably required. *In re Burnand, Ex parte Wilson*

113

JUDGMENT—*Power of Court to go Behind—Bankruptcy Notice—Address of Creditor—Bankruptcy Act, 1863, s. 4, sub-s. 1 (g)—Bankruptcy Rules, 1886, r. 136, form 6.*

The power of the Court in Bankruptcy to go behind a judgment is a power to inquire into the consideration and not into the form of the judgment, and the judgment is conclusive unless the consideration can be questioned.

The address of the creditor in a bankruptcy notice should be of a place where he is to be found during the seven days within which the judgment debt is to be paid or secured, and this is so whether that address is of his residence or place of business. Occasional absence from such place, even for a whole day, will not render the bankruptcy notice inefficient unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing the debt. It matters not that the address is the temporary home of the creditor, who happens to have no permanent home, or that his occasional absence occurs on the last of the seven days. On the other hand, if the creditor, after service of the notice, abandons his place of address, so that it ceases to be such a place as above described, the bankruptcy notice will cease to be efficient.

In re Stogdon, Ex parte Leigh, considered. *In re Beauchamp, Ex parte Beauchamp*

5

LIQUIDATION BY ARRANGEMENT—*Close of Liquidation—Undischarged Debtor—After-acquired Property—Bequest to Debtor—Right of Executors to Retain Debt—Bankruptcy Act, 1869, s. 54.*

Section 54 of the Bankruptcy Act, 1869, which contains provisions dealing with the status of undischarged bankrupts, applies to liquidating debtors.

Ex parte Williams followed.

Prior to 1882 a father had lent his son various sums of money amounting in the whole to 1,133*l.*, for which the son had given him a bill of sale on his furniture. In 1882 the son filed a petition under the Bankruptcy Act, 1869, for liquidation of his affairs by arrangement. In 1883 the liquidation was closed, but the creditors

refused to grant the son his discharge. The father sold the property comprised in the bill of sale for 182*l.*, but did not prove in the liquidation for the balance of his debt. In 1903 the father died, having by his will bequeathed to the son a share of his residuary estate, which amounted to about 2,000*l.* The executors claimed to retain the balance of the debt out of the son's share:—

Held, that section 54 of the Act of 1869 applied, that the debtor not having obtained his discharge, the balance of the debt was a subsisting debt, and that the debtor must therefore bring it into account, together with interest thereon, from the expiration of three years from the close of the liquidation until distribution. *In re Powell, Powell v. Powell*

22

ORDER AND DISPOSITION—*Reputed Ownership—Articles Displayed by Bankrupts in Show-cases with Consent of True Owners—Principal and Agent—Bankruptcy Act, 1883, s. 44, sub-s. 2 (iii.).*

Before goods of another person can be taken to pay the debts of a bankrupt, by reason of the reputed ownership of the bankrupt, it is essential that the true owner of the goods should have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must arise.

W. & Co., who had carried on business as bankers and agents, had been in the habit of introducing their customers to wholesale firms for the purchase of various articles, and amongst them to A. & Co. W. & Co. received from A. & Co. certain silver and electro-plated articles as samples, with a consignment note giving particulars of the articles and their prices, and the correspondence between the parties showed that they were only received by W. & Co. as samples, and were to be put into their show-cases as such, and were to remain at the risk of A. & Co., and there was nothing to authorise W. & Co. to take upon themselves the order and disposition of the goods. W. & Co. also dealt in goods of the same kind on their own account, but the samples of A. & Co. were generally dealt with by them in a different way from the way in which they dealt with their own goods. The samples of A. & Co. were in the possession of W. & Co. at the date of their bankruptcy:—

Held, that A. & Co. had not acquiesced in the bankrupts so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or to induce customers to presume such ownership; and the articles were not in the order and disposition of the bankrupts under such circumstances that they were the reputed owners thereof within the meaning of sub-section 2 (iii.) of section 44 of the Bankruptcy Act, 1883.

Sharman v. Mason explained. In re William Watson & Co., Ex parte Atkin Brothers

256

PETITION—*Creditor—Receiver in Action in Chancery Division—Independent Cause of Action—Judgment Debt Assigned to Receiver—Bankruptcy Act, 1883, s. 6.*

A receiver in an action in the Chancery Division is entitled to present a bankruptcy petition against a debtor to his estate, if the

state of things is such that he has an independent cause of action against the debtor. Consequently, a receiver in a partnership action to whom a judgment debt due to the partnership has been assigned is a good petitioning creditor against the judgment debtor, although the money when recovered is recovered for the purpose of being dealt with in the action.

In re Sacker explained and distinguished. *In re Macoun* . . . 264

PETITION—Debtor's—Committal Orders—Abuse of Process of Court—Annulment of Adjudication—Bankruptcy Act, 1883, s. 8.

Judgment creditors obtained an order against the debtor for payment of the judgment debt by monthly instalments of 4*l.*, in respect of which they also obtained committal orders. While the last committal order was in force the debtor was adjudicated bankrupt on his own petition. The debtor was personally earning about 300*l.* a year. There were no other creditors and no assets. On an application by the creditors to annul the adjudication:—

Held, that the adjudication was properly made and could not be treated as an abuse of the process of the Court, since by reason of the adjudication the bankrupt's future earnings would, under section 44 of the Bankruptcy Act, 1883, be available for payment of the creditors' debt, except to the extent necessary for the support of the bankrupt and his family, according to the rule stated in *In re Roberts, Ex parte Roberts*. *In re Hancock, Ex parte Hillearys* . . . 1

PRACTICE—Consolidation of Proceedings—Administration of Estate of Deceased Partner—Bankruptcy of Surviving Partner—Bankruptcy Act, 1883, ss. 106, 108, 112, and 125.

An order may be made consolidating the proceedings in the administration in bankruptcy of the estate of a deceased member of a firm of two partners with the bankruptcy of the surviving member of the firm. *In re Greaves, Ex parte Official Receiver* . . . 270

—Record Book kept by Trustee—Minutes of Meetings of Committee of Inspection—Right of Debtor to Inspect—Bankruptcy Act, 1883, s. 80—Bankruptcy Rules, 1886, rr. 12, 16, 285, 287, and 292.

A debtor has no right to inspect the "record book" kept by the trustee in his bankruptcy in pursuance of section 80 of the Bankruptcy Act, 1883, and Rule 285 of the Bankruptcy Rules, 1886, and the Court has no power to make any order giving him leave to do so. *In re Solomons, Ex parte Solomons* . . . 268, 345

PROOF—Gaming Debt—New Consideration—Gaming Act, 1892.

The debtor, being sued for a gaming debt of 800*l.*, successfully pleaded the Gaming Act, 1892. Thereupon the creditor wrote to the committee of the debtor's club informing them of the fact, with the result that the debtor was not re-elected. The debtor then agreed to pay the creditor 100*l.* in cash and to give bills for 400*l.*, in consideration of the creditor withdrawing his letter. Upon the debtor

becoming bankrupt, the creditor proved for the amount of the bills then due, but the proof was rejected by the trustee:—

Held, that the bills were given not for the gaming debt, but for a wholly new consideration, which was not illegal, and that therefore the proof was wrongly rejected. *In re Browne, Ex parte Martingell*. 148

PROOF—*Secured Creditor—Valuation of Security—Mistaken Estimate—Amendment of Proof—Bankruptcy Act, 1883, Sched. I., r. 10, Sched. II., rr. 13 and 14.*

The debtor was a registered holder of fully and partly paid-up shares in the applicant company. At the time of proof the company had a first and paramount lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder. No value was set upon this lien in the proof. The articles of association were subsequently altered so as to give a lien on the fully paid-up as well as on the partly paid-up shares. The company sought to amend the proof by a fresh valuation of the security:—

Held, that as the company must, at the date when the original proof was carried in, have contemplated the possibility that the articles might be altered, it could not be said to have omitted to value the security from inadvertence. *In re Rowe, Ex parte West Coast Gold Fields, Limited* 272

— *Voluntary Payment to Creditor by Stranger—Withdrawal—Substitution of Fresh Proof—Bankruptcy Act, 1883, Sched. II., r. 22—Bankruptcy Rules, 1886, rr. 225 to 229.*

A voluntary payment by a stranger to a creditor in respect of a loss occasioned by the debtor is not a payment for which the creditor is bound to give credit in his proof.

Decision of BUCKLEY, J., affirmed.

Per BUCKLEY, J.: A creditor may withdraw his proof at any time before the trustee in bankruptcy has notified that he has admitted or rejected it. *In re Rowe, Ex parte Derenburg & Co.* 130

— *Withdrawal of Time for* 130

PROPERTY—*Covenant to Settle After-acquired Property except Business Assets—Fraudulent Conveyance. In re Reiss, Ex parte Clough* . . . 229

SCHEME—*Rejection—Adjudication—Notice to Debtor—County Court—Application to Annul on Ground of Absence of Notice—Lapse of Time—Bankruptcy Act, 1883, s. 20, sub-s. 1—Bankruptcy Rules, 1886 and 1890, r. 192.*

Though the Court has jurisdiction to adjudicate a debtor bankrupt after a resolution of the creditors to that effect under the Bankruptcy Act, 1883, s. 20, sub-s. 1, without any notice being given to the debtor, the proper practice, as well in the County Court as in the High Court, is that notice should be given to the debtor unless there is some special reason to the contrary. *In re Ponsford, Ex parte Ponsford* 342

SETTLEMENT—Marriage Settlement—Covenant by Husband to Settle After-acquired Property except Business Assets—Fraudulent Conveyance—Vagueness—Release by Discharge in Bankruptcy—Assignment of Furniture—Registration—Act of Bankruptcy—Notice of Suspension—Bankruptcy Act, 1869, ss. 12, 31, and 49—Bills of Sale Act, 1878, s. 4—Bankruptcy Act, 1883, ss. 47 and 49.

The debtor, an outside broker, informed each of his Stock Exchange creditors that he would have difficulty in meeting his payments on pay day, and gave each of them permission to close his account earlier than he could otherwise have done. The debtor had other creditors, to whom no reference was made:—

Held, by the Court of Appeal (reversing WRIGHT, J.), that the debtor had not given notice of suspension amounting to an act of bankruptcy within the Bankruptcy Act, 1883, s. 4, sub-s. 1 (h).

The rule laid down in *Crook v. Morley* applied; and *In re Scott, Ex parte Scott*, and *Hill's Trustee v. Rowlands*, approved.

Held, also, by WRIGHT, J. (and not dissented from by the Court of Appeal), that, for the purposes of section 47, sub-section 2, of the Bankruptcy Act, 1883, a debtor is to be deemed to "become bankrupt" at the date on which the bankruptcy is to be deemed to have commenced according to the terms of section 43.

A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except business assets is not fraudulent and void as against creditors under 13 Eliz. c. 5.

Per VAUGHAN WILLIAMS, L.J.: *In re Clint, Ex parte Bolland*, is no longer to be treated as an authority on this point.

Such a covenant is not too vague and uncertain to be enforced.

Lewis v. Madocks followed.

The husband is not released from such a covenant by his becoming bankrupt and obtaining his discharge under the Bankruptcy Act, 1869, s. 49.

Collyer v. Isaacs and *Hurdy v. Fothergill* distinguished.

An assignment to the settlement trustees of personal chattels in pursuance of such a covenant does not require registration under the Bills of Sale Act, 1878, being within the exception of a marriage settlement contained in section 4.

Wenman v. Lyon and *Courcier v. Bardili* followed. *In re Reis, Ex parte Clough*

229

— **Revocable Settlement—Consent of Trustees—Substituted Settlement—Consideration—"Purchaser"—Avoidment—Bankruptcy Act, 1883, s. 47.**

A., who was then solvent, executed a voluntary settlement revocable with the consent of the trustees. Subsequently, more than three years later, he partially revoked this settlement with the necessary consent. This consent was given on condition that A. should settle certain further property for the benefit (*inter alia*) of the beneficiaries under the former settlement. Within three years of executing this second settlement A. became bankrupt:—

Held, that the second settlement was not a transaction of purchase for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and was void accordingly as against the trustee in bankruptcy.

In re Pumfrey, Ex parte Hillman, as explained in *Hance v. Harding*, followed. *In re Parry, Ex parte The Trustee* 18

SETTLEMENT—*Settlement of Settlor's own Property—Life Estate Determinable on Bankruptcy—Forfeiture—Payment of Debts—Second Bankruptcy.*

An unmarried man settled his own property on himself for life, determinable on bankruptcy, with certain limitations over. He subsequently became bankrupt, and his trustee in bankruptcy obtained an order setting aside the settlement so far as was necessary to pay the bankrupt's debts. The debts were accordingly paid, but the bankruptcy was not annulled. The settlor then became bankrupt a second time, and the trustee in that bankruptcy applied for a declaration that the bankrupt's life estate had vested in him, the trustee :—

Held, that the first bankruptcy operated as a forfeiture of the settlor's life estate, and that it did not therefore vest in the trustee in the second bankruptcy. *In re Johnson Johnson, Ex parte Matthew and Wilkinson* 14

BILLS OF SALE.

BILLS OF SALE ACT, 1878 (41 & 42 Vict. c. 31)—

s 4 229

BILLS OF SALE ACT, 1882 (45 & 46 Vict. c. 43)—

MARRIAGE SETTLEMENT—*Assignment of Personal Chattels. In re Reis, Ex parte Clough* 229

II. COMPANY CASES.

COMPANY.

ARTICLES OF ASSOCIATION—*Shares—Transfer—"Usual Common Form"—Omission of Address of Transferor and Denoting Number of Share—Materiality—Refusal to Register Transfer.*

Where the articles of association of a company provide that all transfers of shares are to be in the "usual common form," a transfer will not be deemed to have failed to comply with that requirement merely because it omits matters which would be contained in a common form, but are wholly immaterial—for example, the address of the transferor and the denoting number of the share, where both of these are well known to the directors. *In re Letheby and Christopher, Limited, Jones's Case* 209

	PAGE
COMPANIES ACT, 1862 (25 & 26 Vict. c. 89)—	
s. 35	66
s. 50	169
s. 67	88
s. 133	393
s. 138	393
s. 161	34, 66
s. 176	93
s. 180	192
s. 192	192
s. 193	192
s. 209	169
Table A., art. 22	159
art. 57	95
COMPANIES ACT, 1867 (30 & 31 Vict. c. 131)—	
ss. 9—12	307
s. 38	283, 421, 444
COMPANIES ACT, 1877 (40 & 41 Vict. c. 26)—	
s. 3	307
COMPANIES (MEMORANDUM OF ASSOCIATION) ACT, 1890 (53 & 54 Vict. c. 62)—	
s. 1	169
s. 3, sub-s. (2)	93
COMPANIES (WINDING-UP) ACT, 1890 (53 & 54 Vict. c. 63)—	
s. 10	291
Sched. I., cl. 8	76
COMPANIES ACT, 1900 (63 & 64 Vict. c. 48)—	
s. 4	412
s. 5	412
s. 14	60
s. 24	34
s. 25	393
COMPANIES (WINDING-UP) RULES, 1903—	
r. 53	214
r. 144	214
CONTRACT— <i>On Behalf of Intended Company—Subsequent Adoption of Contract by Company.</i>	

A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. To obtain such benefit, a new contract must be entered into by the company on the terms of the old contract.

Kelner v. Baxter approved; *Natal Land and Colonisation Co., Limited v. Pauline Colliery and Development Syndicate, Limited* . . . 29

DEBENTURES—*Borrowing for Unauthorised Purposes—Ultra vires—Duty of Lender to Inquire—Knowledge of Director of Lending Company—Notice.*

Where money is being borrowed by a company within the limits of its powers of borrowing, there is no obligation on the lender to inquire for what purposes the borrowing is made, or whether the money borrowed is to be applied for objects within the powers of the borrowing company.

Davis's Case, so far as it is an authority to the contrary, overruled.

Where a director of a lending company has in his private capacity acquired knowledge as to the purposes to which a borrowing company intends to apply money borrowed by it upon the security of a debenture, there is no duty in the director to disclose that knowledge to the lending company, and such knowledge will not be imputed to it so as to avoid the debenture if the purposes are improper and *ultra vires*. *In re David Payne & Co., Young v. David Payne & Co.* 437

— *Debenture Stock—Covering Deed—Sub-demise to Trustees—"Creation" of Charge—Registration—Companies Act, 1900, s. 14.*

Debenture stock was secured by a covering deed made in 1897, under which the proceeds of sale of any specifically mortgaged property and the property on which the same should be invested were to be held by the trustees upon the trusts of the covering deed. A leasehold public-house was subsequently purchased out of the proceeds of sale of certain of the specifically mortgaged property, and was in August, 1902, sub-demised by the company to the trustees, to be held by them upon the trusts of a covering deed:—

Held, that the sub-demise was a "mortgage or charge" created by the company upon the property thereby sub-demised, and consequently required registration under section 14, sub-section 1 of the Companies Act, 1900.

Decision of BYRNE, J., affirmed. *Cornbrook Brewery Co. v. Law Debenture Corporation* 60

— *Purchase by Company of its Own—Re-sale by Company—Rights of Purchasers.*

The effect of a company purchasing its own debentures is to extinguish the debt, for the company cannot be at the same time both mortgagor and mortgagee of its own property.

Where, therefore, a company had taken transfers to itself of its own debentures, and had registered them in its own name and had afterwards re-sold the debentures, the purchasers were held to have acquired no right to share with the other debenture-holders of the same series in the distribution of the proceeds of the security. *In re George Routledge and Sons, Limited, Hummell v. George Routledge and Sons, Limited* 404

— *Transfer to Trustee for Creditors—Transferor Indebted to Company—Debenture-holders' Action—Money Available for Dividend—Claim by Trustee—Cross-claim by Company.*

Where debentures the conditions of each of which were that the moneys thereby secured were to be paid without regard to any

equities between the company and the original or any intermediate holder, and that the registered holder was to be treated as exclusively entitled to the benefit of the debenture, and that the company was not bound to enter on the register notice of any trust or to recognise any right in any other person, were by deed assigned, by persons who were indebted to the company, to a trustee for creditors, and the trustee was entered on the register as the holder of the debentures, and neither the company nor the other debenture-holders had come in under the deed, it was held that the trustee, being simply general assignee in trust for creditors, took the debentures subject to the same equities as his assignors were subject to, and that, consequently, notwithstanding the conditions on the debentures, he was not entitled to share in a fund in Court in a debenture-holders' action, which was available for dividend, without bringing into account the debt due to the company by his transferors.

In re Goy & Co., Farmer v. Goy & Co., distinguished. In re Brown and Gregory, Limited, Andrews v. Brown and Gregory, Limited 218

DEBENTURES—Realisation of Security—Payment on Account of Principal and Interest—Income Tax.

A company's debenture trust deed provided that money arising from realisation of securities should be applied in payment, first, of arrears of interest on debentures, and, secondly, of principal, and the surplus paid to the company. By judgment in a debenture-holders' action it was declared that the trusts of the deed ought to be carried into effect, and usual inquiries were directed. Under orders in the action payment was authorised and made of dividends on account of arrears of interest to a date found by the chief clerk's certificate, and of income tax. Under subsequent orders payment was authorised of dividends on account generally of what was due on the debentures. Realisation was almost completed, and the past payments made "on account generally," together with any further sum which might be available, if applied solely in discharge of the principal due under the debentures, would not be sufficient to pay the principal in full. The Crown claimed income tax on all payments on account generally:—

Held, that payments on account generally ought to be attributed, at the debenture-holders' option, to principal or interest, and income tax paid only on so much as should be attributed to interest. *Smith v. Law Guarantee and Trust Society* 179

— **Validity—Issue of Debentures by Companies Jointly and Severally—Charge on Several Undertakings of the Companies—Proceeds Divided between Companies—Articles of Association—Construction—Power to Borrow Money not Exceeding Amount of Preference Share Capital.**

Three companies, each of which had general power to borrow on mortgage or debentures, issued twenty-five mortgage debentures for 1,000*l.* each. The debentures were headed in the names of the three companies, and were stated to be an issue by the companies jointly. The three companies thereby jointly and severally agreed

to pay to the debenture-holders the principal sum and interest, and they thereby charged with such payments their several undertakings and all their present and future properties and assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three companies, who were in each case the same persons, and the moneys advanced were paid to a joint banking account, and were appropriated in different amounts to each company. Orders had been made for the winding-up of each company, and the debenture-holders had brought an action to enforce their security:—

Held, that having regard to the several obligations of the companies respectively, assuming it was *ultra vires* the companies to issue debentures jointly, the debentures were a valid charge against each company to the extent to which the money advanced came to the coffers of that company.

The articles of one of the companies gave the directors various powers, in addition to their general powers, and in particular power to borrow on the security of the property of the company "any sum or sums of money not exceeding the amount of the preference share capital of the company":—

Held, that this was not a prohibition of borrowing unless and until preference shares had been issued, but was intended for the protection of the preference shareholders if they existed, and until they came into existence the company could borrow under its general powers without regard to this limitation. *In re Johnston Foreign Patents Co., Limited, In re Johnston Die Press Co., Limited, In re Johnstonia Engraving Co., Limited, J. P. Trust, Limited v. The Companies* 378

DIRECTOR—*Articles of Association*—*Secret Profit by Director*—*Automatic Vacation of Office*—*Re-election*—*Continuing Contract*—*Recovery of Director's Fees Paid under Mistake*—*Legal Consideration*—*Companies Act, 1862, Table A, clause 57.*

A provision in the articles of association of a company that a director shall vacate his office on the happening of a certain event operates automatically and *ipso facto* as soon as the event occurs.

Turnbull v. West Riding Athletic Club, Leeds, not followed.

A provision that a director shall vacate his office on becoming secretly interested in any contract with the company operates only where the interest of the director is of such a nature that it may possibly be in conflict with the interest of the company—where the sphere of interest of the company is, to some extent at least, coincident with the sphere of interest of the director.

An action for the recovery of money had and received will lie even in cases where the money has been paid in remuneration of services actually rendered, provided that the services so rendered do not amount to a legal consideration. Services rendered do not amount to a legal consideration unless they have been rendered in response to some request, explicit or implied by law. The acceptance of services rendered is a *prima facie* ground for implying at law

a request; but the Court is at liberty to resist this *primâ facie* inference if warranted by the peculiar circumstances of the case.

A director vacated his office automatically by bargaining for a secret commission on the sale of certain property to the company. The fact was unknown to the company, and the director continued to act and to receive his fees as director. He was subsequently re-elected to office in the ordinary course on his supposed retirement by rotation. At the time of this re-election the sale in question was completed, with the exception of the payment of the secret commission, for which the director had a lien:—

Held, that the bare existence of this lien was not a sphere of interest in the contract on the part of the director in any degree coincident with the sphere of interest of the company—that the interest of the director and the interest of the company no longer came into conflict, and accordingly that the director did not vacate his office on re-election by reason of the existence of the lien.

Held, also, that, although the director, during the period between his vacating his office and his re-election, had rendered services to the company which had been accepted by them, yet, inasmuch as it was impossible for the Court to believe that the company would ever have requested him to render these services had they been aware of the true state of the facts, the Court could not imply a request for these services on the part of the company from the mere fact of their ignorant acceptance of them; and accordingly that the services rendered did not amount to a legal consideration for the fees paid for them, and that the company were therefore entitled to recover these fees as money had and received. *In re Bodega Co., Limited*

95

DIRECTOR—Disability to Vote—Formation of Quorum.

A director of a company is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote. *In re Greymouth-Point Elizabeth Railway and Coal Co., Tuill v. Greymouth-Point Elizabeth Railway and Coal Co.* .

85

— *Misfeasance Summons—Security for Costs.* See WINDING-UP.

— *Ultra vires—Payment of Dividends out of Capital—Knowledge of Shareholders—Action for Recoupment by Shareholder on Behalf of Self and other Shareholders—Retention by Plaintiff of Share of Dividend at Time of Action—Right of Action.*

Directors of a company in March, 1900, paid an interim dividend to the shareholders which was in fact a payment out of capital. The payment appeared on the balance-sheet presented to the shareholders for the year ending 31 July, 1900, and approved by them, and the amount of the dividend was in process of being recouped out of the profits of subsequent years. In March, 1903, two of the shareholders of the company who had received their respective shares of the dividend, with full knowledge of all the facts, and still retained them, brought an action on behalf of themselves and

other shareholders of the company against the company and the directors to make the directors repay the amount of the dividend, on the ground that the payment was an *ultra vires* payment:—

Held, that the plaintiffs could not, in the circumstances of the case, maintain the action.

Per VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J.: A shareholder who has, with full knowledge of the facts, received part of the capital of the company as dividend, cannot maintain an action against the directors of the company to make them repay the amount of the dividend, on the ground that the payment was *ultra vires*, while he retains in his pocket his share of the proceeds of the *ultra vires* act; and the fact that he brings the action in the name of himself and the other shareholders gives him no greater right.

Dictum of BRETT, L.J., in *In re Exchange Banking Co., Flitcroft's Case*, applied by COZENS-HARDY, L.J. *Towers v. African Tug Co.* . . . 198

DIRECTOR—*Vacation of Office—Acts done as Director thereafter—Validation—Articles of Association—Construction—Companies Act, 1862, s. 67.*

One of the articles of association of a company incorporated under the provisions of the Companies Acts, 1862 to 1893, provided: "All acts done at any meeting of the directors or of a committee of such directors or by any person acting as such directors, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or committee, or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director":—

Held, that the provisions of this article and of section 67 of the Companies Act, 1862, validated the acts of a person *bonâ fide* acting as director who had been originally appointed a director but had vacated his office, according to the constitution of the company, on his appointment as secretary thereof, where the fact had been overlooked.

Dawson v. African Consolidated Land and Trading Co. followed. *British Asbestos Co. v. Boyd* 88

DIRECTORS LIABILITY ACT, 1890 (53 & 54 Vict. c. 64)—
s. 3. 283, 421

DIVIDEND—*Ultra Vires—Payment of. See DIRECTOR.*

JOINT STOCK COMPANIES ACT, 1856 (19 & 20 Vict. c. 47)— . . . 93

JOINT STOCK COMPANIES ARRANGEMENT ACT, 1870 (33 & 34 Vict. c. 104)—
s. 2 34

LANDLORD AND TENANT — *Tenant's Fixtures — Mortgagee — Removal after Forfeiture of Lease—Debenture-holders.*

Where a tenant surrenders his lease to the landlord, a mortgagee or purchaser from the tenant has a right to remove fixtures within

a reasonable time after the surrender. So where a company forfeits a lease by passing a resolution for a voluntary winding-up, in which resolution debenture-holders do not concur, the latter have a similar right to remove fixtures within a reasonable time afterwards.

Pugh v. Arton questioned. *In re Glasdir Copper Mines, Limited, English Electro-Metallurgical Co. v. Glasdir Copper Mines, Limited.* 224

LIFE ASSURANCE—*Participating Policy-holders—Rights of Policy-holders to Profits—Power of Company to Alter by New Articles—Companies Act, 1862, ss. 50, 209—Companies (Memorandum of Association) Act, 1890, s. 1.*

A life assurance company constituted by a deed of settlement with byelaws, and originally registered under the Joint-Stock Companies Registration Act, 1844, cannot; when registering itself as a limited company under the Companies Acts, 1862 to 1900, make articles altering the provisions of its byelaws in such manner as to alter the contractual rights of the holders of participating policies of the company acquired under the byelaws.

The power which a company has under section 50 of the Companies Act, 1862, of altering its articles by special resolution, though it enables it to alter to some extent the rights of shareholders in respect of their shares, does not enable it to alter contracts between the company and outsiders, or contracts between the company and shareholders otherwise than in respect to their shares.

Allen v. Gold Reefs of West Africa distinguished.

Semble, observations of BYRNE, J., in *Punt v. Symons & Co.* on this point disapproved. *Baily v. British Equitable Assurance Co.* 169

MEMORANDUM OF ASSOCIATION — *Alteration — Jurisdiction — Company Registered under Joint-Stock Companies Act, 1856—Companies Act, 1862, s. 176—Companies (Memorandum of Association) Act, 1890, s. 3, sub-s. 2.*

The Court has jurisdiction to make an order under the Companies (Memorandum of Association) Act, 1890, in the case of a company registered under the Joint-Stock Companies Act, 1856, although it is not also registered under the Companies Act, 1862.

In re Nitrophosphate and Odams Chemical Manure Co., In re Hong-Kong and China Gas Co., and In re Copiapo Mining Co., followed.

In re General Credit Co. not followed. *In re Euphrates and Tigris Steam Navigation Co.* 93

— *Sale to New Company—Provision for Distribution of Assets and Sale of Shares of Dissident Members—Ultra vires.*

A company which had power under its memorandum of association to sell its undertaking and to accept in payment for the same shares of any other company, whether wholly or partly paid up, entered into an agreement for a sale of its undertaking to a new company, part of the consideration being shares in the new company

of 5s. with 4s. credited as paid up. A clause of the agreement provided that if the selling company should go into liquidation and distribute the shares forming part of the consideration amongst its members, all shares not accepted by members within twenty-one days should be sold and applied in payment of debts and liabilities of the selling company in relief of the obligation of the new company under the agreement :—

Held, that the agreement was not justified by the memorandum of association and was *ultra vires*, for the selling company had no power to contract that upon a liquidation the assets should be divided amongst its shareholders, or that if a shareholder did not choose to undertake the liability under the shares in the new company his shares should be forfeited. *Manners v. St. David's Gold and Copper Mines, Limited* 425

MEMORANDUM OF ASSOCIATION—*Different Classes of Shareholders*
—*Rights inter se Defined by Memorandum*—*Reservation of Power to Modify*—*Validity*—*Reduction of Capital*.

The memorandum of association of a limited company provided that the capital should be divided into preference, ordinary, and deferred shares, and prescribed the rights and privileges of the different classes of shareholders *inter se*, and provided—clause 6 (*f*)—that the rights for the time being attached to the several classes of shares respectively might be modified or dealt with in the manner mentioned in clause 52 of the accompanying articles of association, but not otherwise, and that clause should be deemed to be incorporated therein :—

Held, that the provision in clause 6 (*f*) was a valid provision, and resolutions for the reduction of the capital of the company involving an alteration in the rights of the preference shareholders as regards the ordinary shareholders, which had been sanctioned as required by article 52, could be confirmed by the Court if not unfair in other respects.

Ashbury v. Watson distinguished. *In re Welsbach Incandescent Gas Light Co., Limited* 47

MORTGAGE—*Mortgage by Company of Debenture Stock*—*Clogging Equity of Redemption*—*Option to Mortgagee to Purchase at any Time within Twelve Months*.

A stipulation in a mortgage of debenture stock, the advance being repayable at thirty days' notice on either side, that the mortgagee is to have "the option of purchasing the whole or any part of such stock at 40 per cent. at any time within twelve months" :—

Held to be void upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property.

Decision of the Court of Appeal affirmed. *Samuel v. Jarrah Timber and Wood-Paving Corporation* 276

PROSPECTUS—*Non-disclosure of Contracts*—"Knowingly Issuing"—*Advance Copy of Prospectus—Unauthorised Issue—Ratification—Companies Act, 1867, s. 38—Directors' Liability Act, 1890, s. 3.*

Directors held not liable for non-disclosure of contracts in a prospectus for which they otherwise would have been liable on the ground that it was issued without their authority.

In such a case directors cannot be made liable on the ground that they afterwards ratified and adopted the prospectus, or even derived some advantage from it. *Hoole v. Speak* 421

— *Companies Act, 1867, s. 38—Directors' Liability Act, 1890, s. 3.*

Where the directors of a company enter into a contract with a promoter for the payment of services in the form of a bonus or commission of fixed amount, and the contract is subsequently rescinded and replaced by an undertaking that the promoter's claim to proper remuneration shall be honourably met by the directors, such contract and undertaking ought under section 38 of the Companies Act, 1867, to be disclosed in the prospectus, and in a case to which that section applies the directors are liable for non-disclosure to persons who have taken shares on the faith of a prospectus not mentioning either the contract or undertaking, but referring to certain other contracts as "the only contracts" to which the company was a party.

Decision of the Court of Appeal *sub nom. Broome v. Speak* affirmed. *Shepherd and Another v. Broome* 283

— *Material Contract—Omission—Duty of Director—Liability—Companies Act, 1867, s. 38.*

Where a director has issued a prospectus knowing that there might be contracts material to be stated under section 38 of the Companies Act, 1867, and took no trouble to ascertain the facts, but left the matter to the company's solicitor, his responsibility under that section is not evaded by the fact that he may truthfully say that when he approved the prospectus he had in fact forgotten the existence of a particular contract which was material to be stated. It is not necessary for the plaintiff to show that the director's attention was deliberately and consciously directed to a particular contract which he then omitted to mention.

The duties and responsibilities of a director under section 38 considered, and the ruling of COCKBURN, C.J., in *Twyecross v. Grant* explained. *Trechmann v. Calthorpe; De La Cour v. Clinton; Tail v. MacLeay* 444

REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 Will. 4 c. 27)—
s. 34 192

REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 Vict. c. 57)—
s. 1 192

RECONSTRUCTION—Scheme of Arrangement—Approval by Creditors—Dissentient Shareholders—Companies Act, 1862, s. 161—Joint-Stock Companies Arrangement Act, 1870, s. 2—Companies Act, 1900, s. 24.

A scheme of arrangement for the reconstruction of a company after providing for the claims of the debenture-holders and other creditors of the company, gave options to holders of preference and ordinary shares respectively to take shares in the new company credited as partly paid up in proportion to their holdings in the old company. There was evidence to the effect that if the assets were immediately realised there would be no balance available for meeting the claims of ordinary shareholders. At separate meetings of debenture-holders, creditors, and preference shareholders, three-fourths majorities in favour of the scheme had been obtained, but at the meeting of ordinary shareholders such a majority was not obtained:—

Held, that, notwithstanding that the scheme had not the approval of a three-fourths majority of the ordinary shareholders, the Court had power to sanction it as regards the creditors by virtue of the Joint-Stock Companies Arrangement Act, 1870, s. 2; and as regards the preference shareholders by virtue of the Companies Act, 1900, s. 24. *In re Tea Corporation, Sorsbie v. Tea Corporation* . . .

34

REDUCTION OF CAPITAL—Reserve Fund—Undistributed Profits—Premiums on Leases—Premiums on Issue of Preference Shares—Capital Lost or Unrepresented by Available Assets—Apportionment of Loss between Capital and Reserve—Companies Act, 1867, ss. 9–12—Companies Act, 1877, s. 3.

The provisions of section 3 of the Companies Act, 1877, empowering a company to cancel "any lost capital, or any capital unrepresented by available assets," are alternative provisions; the latter is not explanatory of the former.

A company with a share capital of 1,950,000*l.* had formed a reserve of 292,612*l.* 18*s.* 1*d.*, representing partly premiums received for leases, partly premiums received on the issue of preference shares, and partly undistributed profits. Under the articles the reserve could be applied to meet contingencies, or for equalising dividends, or repairing, improving, and maintaining the property of the company, or for other purposes, as the directors should think conducive to the interests of the company. It might be employed in the business of the company, and it was in fact so employed, and not kept separate. Certain of the company's assets had depreciated by 591,707*l.* 13*s.* 10*d.*, and to that extent capital had been lost or was unrepresented by available assets. It was proposed to reduce the company's capital, writing 396,000*l.* of the loss off by extinguishing a corresponding amount of shares, and to meet 195,707*l.* 13*s.* 10*d.* of the loss by writing that amount off the reserve:—

Held, that the reserve did not represent capital of the company properly so called, and the proper course would be to apportion the loss between the reserve and the share capital; and that the scheme

for the reduction of the capital of the company which proposed to attribute more than the rateable proportion of loss to the reserve ought to be sanctioned by the Court.

Per VAUGHAN WILLIAMS, L.J. : If the profit and loss account of a company shows a profit balance, that balance can be distributed as dividend, notwithstanding that the company has at the time lost capital, and the loss can be written off capital entirely without touching upon any fund properly appropriated for dividend, even if the fund has arisen after the loss of capital.

In re Burrow Hematite Steel Co. explained by COZENS-HARDY, L.J.
In re Hoare & Co., Limited

307

SHARES—*Call for whole Amount remaining Unpaid—Non-payment—Forfeiture—Sale—Condition that Purchaser be discharged from Prior Calls—Subsequent Call—Liability of Purchaser—Companies Act, 1862, Table A., art. 22.*

A limited company, having power to do so, forfeited shares for non-payment by the holders of a call for the full amount remaining unpaid thereon. The company then sold the shares to the appellants, the contract of sale providing that the shares were to be deemed discharged from all prior calls. Subsequently, the call on the former shareholders remaining unpaid by them, the company made a call on the appellants :—

Held, that the contract of sale did not protect the appellants from liability for the subsequent call.

Article 22 of Table A in Schedule I. of the Companies Act, 1862, provides a mode by which a good title can be given to the purchaser of forfeited shares; it preserves such purchaser from liability in respect of calls made prior to his purchase, but does not relieve him from liability in respect of money remaining due on the shares.

Decision of the Court of Appeal affirmed. *New Bulkis Eersteling, Limited v. Rundt Gold-Mining Co.*

159

— *Irregular Allotment—Voidable or Void—Company Registered before Companies Act, 1900—Companies Act, 1900, ss. 4 and 5.*

An allotment of shares made by the directors of a company before the minimum subscription is obtained is voidable, not void. If, owing to the fact of the company having been registered before the passing of the Companies Act, 1900, the time limit fixed under section 5 by reference to the statutory meeting is inapplicable, the shareholder may rescind his contract to take the shares at any time before he has affirmed it expressly or by conduct.

An allotment by directors in contravention of section 4 is not *ultra vires*, but is simply a breach of a statutory duty for which the shareholder has his legal remedy. The Court will not, therefore, interfere by injunction to restrain the directors from proceeding with the allotment. *Finance and Issue, Limited v. Canadian Produce Corporation*

412

SHARE CERTIFICATE—*Forgery by Secretary—Estoppel.*

The articles of association of a company directed that the certificates of title to shares in the company should be issued under the seal of the company and signed by two directors and countersigned by the secretary. The secretary, in order to procure a loan for his own purposes, gave, as security to the plaintiffs, a document purporting to be a certificate for 5,000 shares in favour of certain nominees of the plaintiffs. This document appeared to be regular on the face of it, being apparently sealed with the seal of the company, signed by two directors, and countersigned by the secretary; but, in fact, the seal had been affixed without authority, and the signatures of the two directors had been forged by the secretary. On the faith of this document the plaintiffs procured from their nominees and advanced to the secretary the sum of 20,000*l.* They then applied to have their nominees registered as holders of 5,000 shares. The company, having discovered the fraud of the secretary, refused to register the nominees of the plaintiffs. In an action to recover damages for the refusal—*held*, that the company were not estopped from denying the plaintiffs title to 5,000 shares, and from refusing to register the nominees of the plaintiffs, inasmuch as the actual scope of the secretary's authority did not cover any acts other than those of a purely ministerial character, such as bringing the certificate before the directors and appending the seal of the company in their presence.

Shaw v. Port Philip Gold-Mining Co. discussed.

Ruben and Another v. Great Fingall Consolidated, Limited and Others 353

SHARES—*Issue at a Discount—Debentures issued at a Discount—Option to Exchange Debentures for Fully-Paid Shares at 1*l.* Share for 1*l.* of Debenture—Validity of Scheme.*

A company proposed to issue debentures for 100*l.* each at 80*l.* per debenture, the principal sum to be repaid on 1 November, 1909, or such earlier date as the same might become payable under the conditions of the debentures. The circular announcing the issue contained this clause:—"Debenture-holders will have the right at any time prior to 1 May, 1909, to exchange their debentures for fully paid shares in the company at the rate of one 1*l.* fully paid share for every 1*l.* of the nominal amount of the debentures." Under the conditions of the debentures the principal sum was to be immediately repayable in the event of the registered holder of the debenture giving the company notice in writing directing it to allot to him fully paid shares in exchange for the debenture in accordance with this scheme:—

Held (reversing the judgment of BUCKLEY, J.), that the scheme as it stood might be made use of for the purpose of acquiring fully paid shares of the nominal value of 100*l.* by the payment of 80*l.* only, and it was open to abuse, and an injunction ought to be granted restraining the issue of the debentures pursuant to the scheme.

Moseley v. Koffyfontein Mines, Limited 294

— *Transfer of.* See TRANSFER.

SHEFFIELD CORPORATION ACT, 1883 (46 & 47 Vict. c. lvi.)—

ss. 27, 29, 30, 32 321

TRANSFER—Corporation Stock—Forged Deed of Transfer—Innocent Transferee—Registration—Implied Indemnity—Warranty of Title—Sheffield Corporation Act, 1883, ss. 27, 29, 30, and 32.

A corporation or company which has put upon it by Act of Parliament the duty of keeping the register of the holders of stock issued by it, and of issuing certificates to the stockholders, does not, when registering a transfer of stock sent in to it, act voluntarily on the request of the transferee, but acts in the performance of a statutory duty. When receiving a transfer it has a duty as between itself and the transferor to see that the transfer was really the act of the transferor. It cannot assume as against the transferee in the ordinary course that he had personally the means of seeing to the actual execution of the transfer by the transferor. It can only assume that the transferee has taken reasonable care in the matter, and had ground for believing, and did believe, that the transfer which purported to be executed by the transferor had in fact been issued by him. And no warranty of the execution of the transferor can be implied against the transferee, nor can any contract be implied against him to indemnify the company or corporation if it should turn out that the transfer had not in fact been executed by the transferor.

Decision of Lord ALVERSTONE, C.J., reversed. *Sheffield Corporation v. Barclay & Co.*

321

— **Registration of—Unreasonable Delay—Reconstruction—Rectification—"Nunc pro tunc"—Companies Act, 1862, ss. 35 and 161.**

The power of the Court to rectify the register of members conferred by section 35 of the Companies Act, 1862, can be exercised after the liquidation of the company, and if not then reduced to merely settling the list of contributories.

Where, owing to unnecessary delay, a transfer of shares was not registered prior to the company going into voluntary liquidation for the purpose of reconstruction under the Companies Act, 1862, s. 161, the Court, in rectifying the register, directed the registration to take effect from the time when in the ordinary course of business the transfer ought to have been registered, the effect being to make valid a notice of dissent under section 161 given by transferees who at the time ought to have been, but were not, registered as members of the company.

In re Joint-Stock Discount Co., Nation's Case, approved and followed. *In re Sussex Brick Co.*

66

VENDOR AND PURCHASER—Title—Legal Estate—Private Partnership—"Company duly Constituted by Law"—Registration—Vesting of Real Estate—Companies Act, 1862, Part VII., ss. 180, 192, 193—Statute of Limitations—Trustee—Possession—Real Property Limitation Act, 1833, s. 34—Real Property Limitation Act, 1874, s. 1.

In 1867 C. and seven other persons formed a private partnership, and immediately afterwards C. conveyed to the eight partners certain real estate to hold unto and to the use of the grantees as part of the joint-stock assets of the partnership. Shortly afterwards the business was converted into a limited liability company, and the Registrar of

Joint Stock Companies gave a certificate of incorporation as of the date of the formation of the partnership. There was no deed of conveyance of the property to the incorporated company, but in 1891 the company conveyed it by deed to a new company, which in 1902 agreed to sell it to a purchaser. Upon the purchaser's contention that the legal estate was outstanding in the eight grantees:—

Held, that the partnership was not a "company duly constituted by law" within the meaning of section 180 of the Companies Act, 1862, so as by section 193 of that Act to vest the legal estate in the incorporated company; and that the legal estate was therefore left in the grantees or the survivor of them in trust for the company.

But *held*, that the legal estate in the grantees as such trustees was, in view of the undisturbed possession of the new company since 1891, barred and extinguished by operation of the Real Property Limitation Acts, 1833 and 1874, and that the vendors had therefore shown a good title.

Kibble v. Fairthorne applied. In re Cussons, Limited 192

WINDING-UP—*Appeal—Order made by Registrar—Practice—Application to Judge.*

When a matter in the winding-up of a company has been heard by the Registrar, and he has made an order either granting or refusing the application, the proper course for those who wish to reverse his decision is to move before the Judge, and not to appeal direct to the Court of Appeal. *In re Pretoria Pietersburg Railway Co.* 318

— *Documents containing Information obtained by Official Receiver—“Property of the Company”—Subsequent Appointment of Liquidator—Right to Documents—Companies (Winding-up) Rules, 1903, Rules 53 and 144.*

Where, in the case of a company ordered to be wound up by the Court, the official receiver has, under Rule 53 of the Companies (Winding-up) Rules, 1903, obtained information from officers of the company, the notes, memoranda, or other documents containing such information are not the "property of the company" within Rule 144 (1) which the official receiver is bound to put into the possession of a liquidator subsequently appointed, and the information so obtained cannot in the absence of evidence be said to be "information respecting the estate and affairs of the company . . . necessary or conducive to the due discharge of the duties of the liquidator" within Rule 144 (3), which it is the duty of the official receiver, if so requested by the liquidator, to communicate to such liquidator.

Semble, the Court may in its discretion, upon an application supported by sufficient evidence, direct the official receiver as its officer to produce or hand over to the liquidator the documents containing such information. *In re Lake George Mines, Limited* 214

— *Liquidator—Statutory Duty to Pay Debts—Dissolution—Negligence—Unpaid Creditor—Liability of Liquidator—Companies Act, 1862, ss. 133 and 138—Companies Act, 1900, s. 25.*

It is the duty of a liquidator before distributing the assets of a company not only to advertise for creditors but also to write to those

creditors of whose existence he knows and who have not sent in claims, and ask them if they have any claims against the company.

The duty imposed on a liquidator of paying the debts of the company is an absolute statutory duty without limit in point of time and with no provisions for the release of the voluntary liquidator. So long as the company remains in existence the creditors and contributories have a remedy, and can apply to the Court in the winding-up to assert their rights; but when the company has been dissolved, and the statutory remedy is therefore gone, the statutory duty still remains, and the liquidator is personally liable at law for a breach of that duty.

Knowles v. Scott distinguished. *Puleford v. Devenish* . . . 393

WINDING-UP—*Misfeasance Summons*—*Security for Costs by Liquidator*—*Companies (Winding-up) Act, 1890, s. 10.*

The practice of the Court is not to order a liquidator of a company in winding-up to give security for costs on a summons by him under section 10 of the Companies (Winding-up) Act, 1890. It will, however, in a proper case, make an order against him personally for the costs of such an application.

The principle of *Cowell v. Taylor* applied. *In re Strand Wood Co.* 291

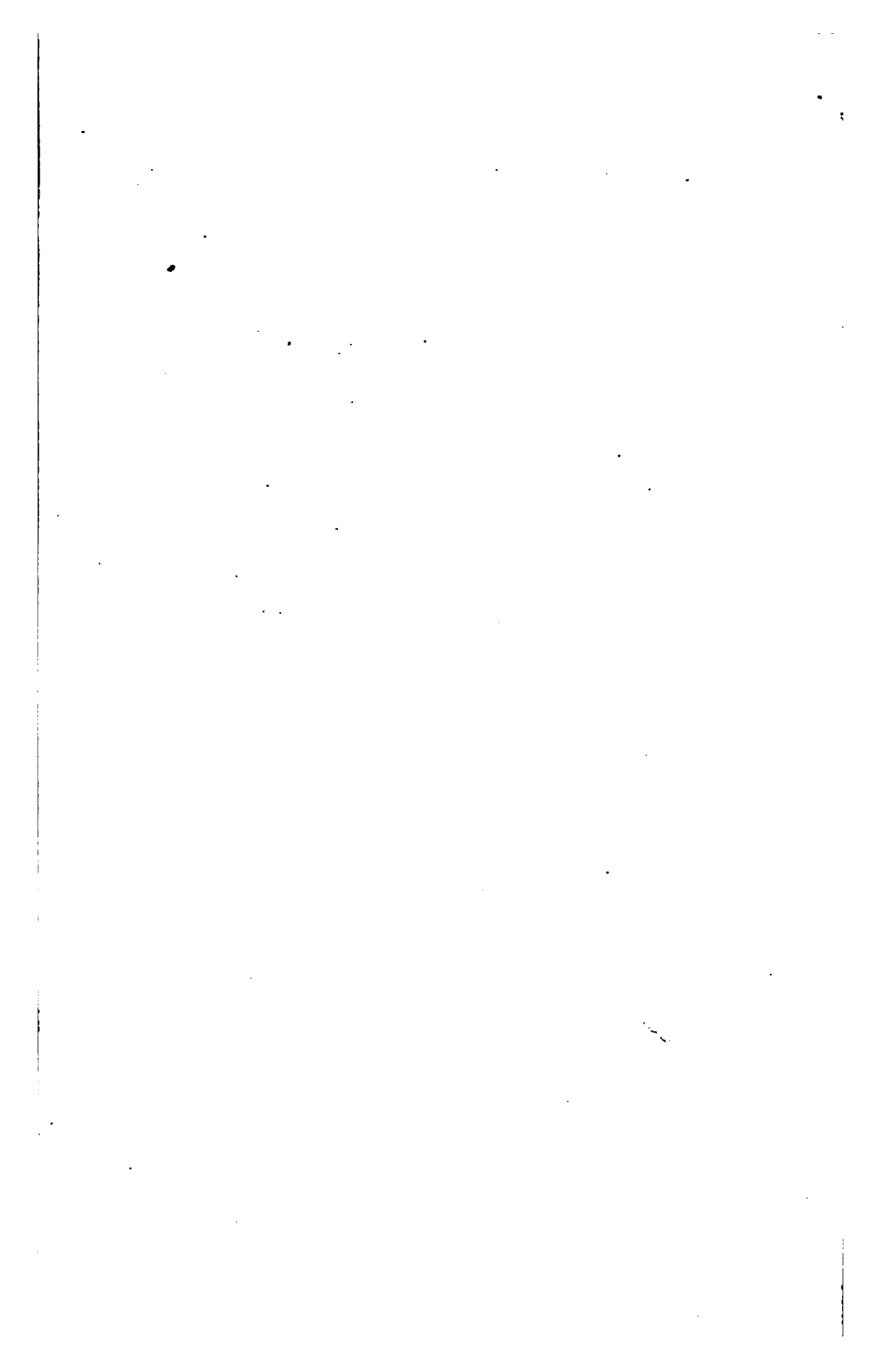
— *Petition—Dismissal with Costs—Contributories Opposing Petition—Taxation of Costs—Allowances in respect of Copies of Evidence.*

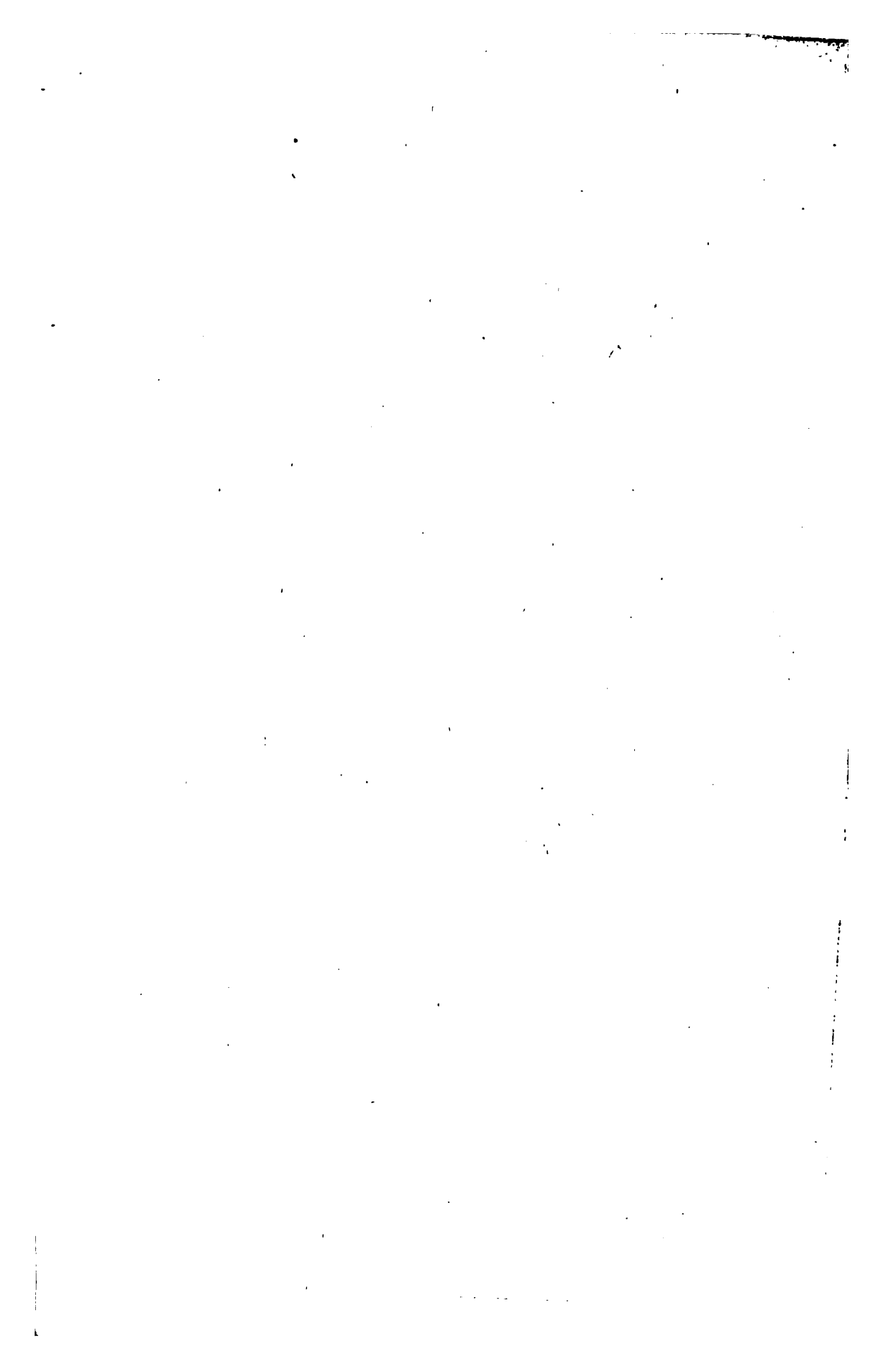
Where the common order is made dismissing a winding-up petition with costs and the contributories are in the ordinary way allowed one set of costs between them, they will not upon taxation be allowed the usual charges consequent upon taking copies of the evidence filed by the petitioner and the company respectively. If any such allowances are desired, application must be made to the Court at the hearing of the winding-up petition. *In re Ibo Investment Trust, Limited* . . . 105

— *Solicitor—Claim for Costs—Lien on Documents—Proof of Debt—Omission to mention Lien—Amendment of Proof—"Inadvertence"—Companies (Winding-up) Act, 1890, Schedule I., clause 8.*

Where a solicitor, who is a creditor for costs against a company in liquidation, claims a lien on documents of the company in his possession, but omits to mention the lien in his proof of the debt due to him, and subsequently acts as an unsecured creditor, he will not be allowed as a matter of right under the Companies Act, 1890, Schedule I., clause 8, to withdraw or amend his proof so as to claim his lien. Leave to amend will not be given unless the Court is satisfied that the omission was due to inadvertence on his part, and that the position of the liquidator has not been altered since the proof was carried in a manner which is inconsistent with the lien claimed. *In re Safety Explosives, Limited* . . . 76

END OF VOL. XI.





County Courts.—The Annual County Courts Practice; containing the Jurisdiction and Practice under the County Courts Act, the Bills of Exchange Act, and the Employers' Liability Act, and the Statutes and Rules of Practice. By His Honour Judge SMYLY. 2 vols. 25s.

Criminal Law.—ARCHBOLD'S (J. F.) Pleading, Evidence and Practice in Criminal Cases, with the Statutes and Precedents of Indictments, by Sir J. JERVIS. 22nd Edit. By W. F. CRAIES. 11. 11s. 6d. 1900.

A Collection of Criminal Acts, with Notes, &c. By W. F. CRAIES. 10s. 1894.

Mew's Digest of Cases relating to Criminal Law to the end of 1897. 25s. 1898.

RUSSELL (Sir W. O.) on Crimes and Misdemeanours. 6th Edit. 3 vols. 5l. 15s. 6d. 1896.

ROSCOR'S (H.) Digest of the Law of Evidence in Criminal Cases. 12th Ed. By A. P. KEEP. 11. 11s. 6d. 1898.

Deeds.—Rules for the Interpretation of Deeds. With a Glossary. By Sir H. W. ELPHINSTONE, R. F. NORTON, and J. W. CLARK. 2nd Edit. *In preparation.*

KELKE'S Epitome of Rules for Interpretation of Deeds. 6s. 1901.

Dictionary.—The Judicial Dictionary, or Interpreter of Words and Phrases by the British Judges and Parliament. By F. STROUD. 2nd Edit. 3 vols. 4l. 4s. 1903.

Digest of English Case Law (The).—Superseding and Consolidating all previous Digests of the Reports down to the end of 1897, including a selection of Irish Cases. By JOHN MEWS, assisted by Nineteen other Barristers-at-Law. 20l. 1898.

Continued annually.

A Digest of Cases Overruled, &c., in the English Courts to the end of 1899. By W. A. G. WOODS and J. RITCHIE. *In preparation.*

Divorce.—BROWNE & POWLES' Law and Practice in Divorce and Matrimonial Causes; with the Statutes, Rules, Fees and Forms. 6th Edit. 25s. 1897.

Easements.—GALE on Easements. 7th Edit. By G. CAVE. 25s. 1899.

Ecclesiastical Law.—Phillimore's Ecclesiastical Law of the Church of England. By Sir ROBERT PHILLIMORE. 2nd Edit. 2 vols. 3l. 3s. 1895.

Ejectment.—WILLIAMS (J. H.) and YATES' (W. B.) Law of Ejectment. 16s. 1894.

Equity.—WHITE & TUDOR'S Selection of Leading Cases in Equity, with Notes. 7th Edit. By T. SNOW and W. F. PHILLIPOTS. 2 vols. 3l. 15s. 1897.

KELKE'S Epitome of Leading Cases in Equity, founded on White and Tudor. 6s. 1901.

Evidence.—TAYLOR'S (PITT) Treatise on the Law of Evidence, as administered in England and Ireland. By His Honour Judge PITT-TAYLOR. 9th Edit. By G. PITT-LEWIS. In 2 vols. 3l. 3s. 1895.

BEST'S Principles of Evidence. With Elementary Rules for conducting the Examination and Cross-Examination of Witnesses. 9th Ed. By J. M. LELY. 25s. 1902.

Executors.—WILLIAMS' (Sir E. V.) Treatise on the Law of Executors and Administrators. 9th Edit. 3l. 16s. 1893.

Factories.—Law relating to Factories and Workshops under the Factory and Workshop Act, 1901. With Rules, Orders, &c., and other Statutes affecting the subject. By W. BOWSTEAD. 10s. 1901.

Forms and Tables.—ROUSE'S Practical Man. 17th Edit. Giving many extra Instructions, Forms, Rules and Tables. By E. E. H. BIRCH. 10s. 6d. 1900.

CHITTY'S Forms of Proceedings in the King's Bench Division, and on appeal therefrom. 13th Edit. 36s. 1902.

Fraud.—KERR'S Treatise on the Law of Fraud and Mistake. 3rd Edit. By S. E. WILLIAMS. 25s. 1902.

Guide for Articled Clerks.—A new Guide for Articled Clerks, containing the most recent Regulations and Examination Papers. By H. W. STIFF, Solr. 6s. 1895.

Guide to the Bar.—A New Guide to the Bar, containing the most Recent Regulations and Examination Papers. By M. A. and LL.B., Barristers-at-Law. 5s. 1896.

Horses.—Oliphant's Law of, including the Law of Innkeepers, Veterinary Surgeons, &c., and of Hunting, Racing, Wagers and Gaming. 5th Edit. By CLEMENT ELPHINSTONE LLOYD, B.A. Oxon. 21s. 1896.

Income Tax.—Income Tax Acts, with Introduction, Notes, and Cross-references. By H. ST. G. PEACOCK. 15s. 1901.

Injunctions.—KERR on the Law and Practice of Injunctions. 4th Edit. By E. P. HEWITT, S. E. WILLIAMS, and J. M. PATERSON. 35s. 1903.

International Law.—WESTLAKE, J., K.C., on Private International Law. 3rd Edit. 16s. 1890.

Interpleader.—Law and Practice of Interpleader in the High Court and County Courts. With Forms, &c. By M. CABABÉ. 3rd Edit. 6s. 1900.

Justices.—WIGRAM'S Justices' Note Book. 7th Edit. 10s. 6d. 1900.

Landlord and Tenant.—WOODFALL'S Law of Landlord and Tenant. 17th Edit. By J. M. LELY. 38s. 1902.

Leading Cases.—SMITH'S Leading Cases. 11th Edit. By T. W. CHITTY, H. CHITTY and J. HERBERT WILLIAMS. £3 10s. 1903.

Fifteen Decisive Battles of the Law. By E. A. JELF. 3s. 6d. 1903.

Licensing.—Licensing Law.—So far as it relates to the Sale of Intoxicating Liquors, Theatres, Dancing, etc. By R. MONTGOMERY. 2nd Ed. 18s. 1901.

Local Government and Taxation.—An Outline of, in England and Wales, including London. By R. S. WRIGHT and H. HOBHOUSE. 2nd Edit. 7s. 6d. 1899.

Master and Servant.—SMITH'S Law of Master and Servant, including their Masters and Workmen in every description Trade and Occupation. 5th Edit. 28s. 1901.

Maxims.—Broom's (Dr.) Selection Legal Maxims, Classified and Illustrated. 7 Ed. by H. F. MANISTY and H. CHITTY. 28s. 1901.